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AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

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VOL. LXXXV.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

PERRY v. BOYD.

[128 Ala. 162, 28 South. 711.]

VENDOR AND PURCHASER — RESCISSION WHERE VENDOR WARRANTS TITLE.—A bill in equity to rescind a contract for the sale of land on the ground of misrepresentations and fraud by the vendor may be maintained, although the vendee may also sue at law upon the covenants of warranty contained in the deed. (p. 19.)

VENDOR AND PURCHASER—RESCISSION FOR MISREPRESENTATION.—A material fact misrepresented by the vendor and relied and acted upon by the vendee entitles the latter to a rescission of a contract for the sale of land. (p. 19.)

VENDOR AND PURCHASER.—ON RESCISSION OF A CONTRACT TO PURCHASE LAND THE VENDEE IS ENTITLED to the purchase money, if paid, and if not paid, to an injunction against its collection, without regard to the solvency of the vendor. (p. 19.)

VENDOR AND PURCHASER—RESCISSION, RIGHT OF, NEED NOT BE DELAYED UNTIL INJURY ACCRUES.—If a purchaser has been induced to enter into a contract for the sale of land by the misrepresentations of the vendor as to any matter affecting the enjoyment of the rights intended to be conferred by the contract, the purchaser need not wait until the enjoyment is actually disturbed or interfered with, before filing his bill for a rescission. (p. 19.)

VENDOR AND PURCHASER.—DUTY TO MAKE THE TITLE GOOD is upon the vendor, and not upon the purchaser. (p. 19.)

VENDOR AND PURCHASER—RESCISSION OF CONTRACT—OFFER TO RECONVEY.—A refusal of the vendor, upon demand, to rescind a contract for the conveyance of land, dispenses with the necessity of a formal offer to reconvey. (p. 20.)

VENDOR AND PURCHASER—RESCISSION OF CONTRACT.—TENDER OF DEED reconveying property held under

a contract of sale is not essential to the rescission of the contract on the ground of fraud. (p. 20.)

VENDOR AND VENDEE—RESCISSION OF CONTRACT.—
RESTORATION OF POSSESSION or abandonment of the property is not essentially a prerequisite to the rescission of a contract for its sale. (p. 20.)

Bill for the rescission of a contract for the sale of certain lands and water-power. It alleged that complainants purchased of the defendant certain lands, water rights, and water privileges and rights of way on Cypress creek, describing them particularly, including the right to construct or excavate a tunnel through or under any of the lands owned by defendant, from any point on such creek to any other point thereon, and to divert the waters of such creek through said tunnel. Defendant represented to complainant that he had a good title to, and right to convey, all of said property. As an inducement for making the purchase, defendant represented that he owned all of the water rights and privileges on such creek for a distance of five miles, together with the right to tunnel through a certain hill and divert the waters of such creek through such tunnel. Complainants, relying in good faith upon representations made by the defendant, paid him seven thousand dollars, and executed to him two notes for the sum of four thousand dollars each, due in three and six years from date, with interest and a mortgage to secure such notes, and also agreed to furnish the defendant with one hundred horse-power of water. Complainants went into possession of the property under a warranty deed. They purchased the property for the purpose of erecting a power plant to furnish electric light and power to manufacturing concerns, all of which was well known to the defendant. The complainants, relying upon the representations thus made by the defendant, at once proceeded to erect a dam across such creek and make other improvements upon such property, expending thereon the sum of seven thousand dollars. About four months after making the purchase and after having made such expenditures in good faith, complainants discovered that defendant never owned the right to divert the water of such stream through such tunnel, which constituted a material portion of the property purchased from defendant and a material inducement for complainants to make such purchase. As soon as complainants discovered the misrepresentations made by the defendant, they notified him thereof, and demanded that he either procure such right for them, or return the purchase money already paid, together with interest thereon, and surrender and cancel the

notes and mortgage on such property, and pay for the permanent improvements erected by complainants. Defendant refused such demand or to rescind the contract, and complainants abandoned the possession of the property and notified defendant thereof, offering to reconvey to him all such title as he had conveyed to them. Defendant demurred to the bill. The demurrer was overruled and from such ruling he appealed.

Simpson & Jones and J. B. Weakley, for the appellant.

R. W. Walker and J. T. Ashcraft, for the appellee.

¹⁶⁸ DOWDELL, J. The bill in this case is filed for the rescission of a contract on the ground of fraud. The bill was demurred to by the respondent, and the present appeal is taken from the decree of the chancellor overruling the demurrer.

It is no objection to the equity of a bill to rescind a contract on the ground of misrepresentations and fraud by the vendor that the vendee may sue at law upon the covenants of warranty contained in the deed: *Cullom v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Baptiste v. Peters*, 51 Ala. 158.

When a material fact is misrepresented, and the other party relies and acts upon it, a court of equity will, at the suit of the latter, rescind the contract; and when a purchaser is entitled to a rescission of the contract by reason of material misrepresentations of the seller, upon which the purchaser relied, the purchase money, if paid, must be refunded, and if not paid, its collection will be enjoined without regard to the solvency of the vendor: *Lanier v. Hill*, 25 Ala. 554; *Kelly v. Allen*, 34 Ala. 663; *Baptiste v. Peters*, 51 Ala. 158.

Where a party has been induced to enter into a contract by the misrepresentations of the other contracting party as to any matter affecting the enjoyment of the rights intended to be conferred by the contract, the party thus wronged or defrauded need not wait until the enjoyment of the rights conveyed be actually disturbed or interfered with, before filing his bill for a rescission of the contract.

What we have said disposes of the first five grounds of the demurrer.

The sixth ground is equally without merit. It is the duty of the vendor and not of the purchaser to make the title good: *Frix v. Miller*, 115 Ala. 476, 67 Am. St. Rep. 57, 22 South. 146.

The seventh ground of demurrer is not insisted upon by counsel.

The eighth and last ground is urged by counsel as being fatal to the bill. The point made is that the demand ¹⁰⁰ made by complainants for a rescission of the contract was not accompanied with an offer to convey back to the respondent all the property, rights, and privileges, which they took under their deed from the respondent. In the first place, the bill avers that upon a demand made by the complainants for a rescission of the contract, the defendant refused to rescind. This refusal by the defendants to rescind dispensed with the necessity of a formal offer to reconvey, if such was a prerequisite to the filing of the bill in order to give it equity. The bill contains an offer "to reconvey to the respondent all such title to said property as he has conveyed to them," and, as amended, avers that before the filing of the bill complainants abandoned the possession of the said property, and notified the defendant that they had given up the same.

No authority has been cited by counsel where in a bill for the rescission of a contract on the ground of fraud, that a tender of a deed reconveying the property was necessary to give equity to the bill. The weight of authority seems to be in such a case that a restoration of possession of the property, or abandonment of the same, is not essentially a prerequisite to the filing of the bill. It is true that the principle laid down in *Martin v. Martin*, 35 Ala. 560, was questioned in *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314, as not being sustained by the authorities there cited. But we find upon an examination of the authorities cited in that case that the principle stated is supported, and we adhere to the decision in *Martin v. Martin*, 35 Ala. 560: See *Garner v. Leverett*, 32 Ala. 410; *Bailey v. Jordan*, 32 Ala. 50; *Prout v. Roberts*, 32 Ala. 427; *Meeks v. Garner*, 93 Ala. 17, 8 South. 378; *Foster v. Gressett*, 29 Ala. 393; *Younge v. Harris*, 2 Ala. 108.

There was no error in overruling the demurrer, and the decree of the chancellor is affirmed.

A Vendee May Rescind a purchase of land for misrepresentations of the vendor: *Wilson v. Carpenter*, 91 Va. 183, 50 Am. St. Rep. 824, 21 S. E. 243; *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. Rep. 92, 39 Atl. 104; *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; though there are covenants of warranty to which he might resort: *Parham v. Randolph*, 4 How. 435, 35 Am. Dec. 403. But see *Fields v. Clayton*, 117 Ala. 588, 67 Am. St. Rep. 189, 20 South. 530; *Bradfeldt v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701, 40 Pac. 1.

Rescission by a Vendee of a Contract for the sale of land does not follow, unless he performs, or offers to perform, on his part, and abandons possession to the vendor: *Duncan v. Jeter*, 5 Ala.

604, 39 Am. Dec. 342; *Smith v. Busby*, 15 Mo. 387, 57 Am. Dec. 207. If he desires to rescind for want of title and to recover the purchase money paid, and interest, he must first tender his grantor a reconveyance and the possession: *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68. Yet he is not bound to surrender possession, if he has made large payments, and the vendor is insolvent: *Bryan v. Loftus*, 1 Rob. 12, 39 Am. Dec. 242; and unable or unwilling to make title: *Duncan v. Jeter*, 5 Ala. 604, 39 Am. Dec. 342; *Greenlee v. Gaines*, 13 Ala. 198, 48 Am. Dec. 49.

**AMERICAN PIG IRON STORAGE WARRANT COMPANY.
v. GERMAN.**

[126 Ala. 194, 28 South. 603.]

PLEDGE—RIGHT TO ENFORCE.—If personalty pledged as collateral security is taken from the possession of the pledgee without his knowledge or consent, and an adverse claim is set up thereto, the pledgee may, after default made in the payment of the principal debt, maintain a bill in equity to determine the rights of the parties to the property and to enforce the pledge by judicial sale. (p. 24.)

CREDITORS' BILLS.—THE PENDENCY of a creditor's bill filed by one creditor on behalf of himself and others does not preclude another creditor, not a party to the first bill, from proceeding by an original creditor's bill. (p. 24.)

PLEDGE.—STATUTES REQUIRING CHATTEL MORTGAGES to be in writing and authorizing their registration, have no application to a pledge. (p. 24.)

PLEDGE AND MORTGAGE—DIFFERENCE BETWEEN.—A pledge differs from a mortgage in that the pledgee must have possession and the pledgor retains the legal title to the property, while a mortgage passes the legal title to the mortgagee, and may allow the possession to remain in the mortgagor. (p. 24.)

PLEDGE. — NOTICE TO THE PUBLIC OF THE PLEDGEE'S INTEREST in the property is sufficiently given by the possession which must reside in the pledgee, and which, to be effective either for notice or to give validity at law to the pledge, must be complete, unequivocal, and exclusive. (p. 25.)

PLEDGE—DELIVERY, WHEN MUST BE MADE.—It is not essential to the validity of a pledge that delivery of the property be made at the time when the contract is executed. The pledge may take effect upon subsequent delivery made in performance of such contract. (p. 25.)

INTERVENTION—PLEADING.—PETITIONS by intervening creditors in a suit by a creditor's bill are not required to conform to all the technical rules applicable to pleadings as between the original parties, and when filed by leave of court other parties in interest are entitled to notice and an opportunity to defend; but such petitions need not name them as defendants, nor need they contain any formal prayer for process. (p. 26.)

PLEDGE—DELIVERY.—If pledged property, in accordance with the agreement of the parties, is placed in a designated place and marked with the pledgee's name, there is a sufficient delivery to sustain the pledge. (p. 27.)

PLEDGE — WRONGFUL RETAKING POSSESSION.—A pledgor cannot defeat his pledge by wrongfully retaking possession. (p. 27.)

REFEREES.—ADMISSION BY A REFEREE OF INCOMPETENT EVIDENCE cannot reverse a decree supported by competent evidence. (p. 27.)

REFEREE—SUSTAINING REPORT OF, ON CONFLICTING EVIDENCE.—THE FINDINGS OF A REFEREE will not be set aside if sustained by testimony sufficient to support the verdict of a jury. (p. 27.)

RECEIVERS—POWER OF TO CARRY ON BUSINESS AND CREATE LIABILITIES.—If a manufactory and the property intended for use therein are in the hands of a receiver, the court has power to direct the discharge of threatened encumbrances, and to have its accumulated raw material manufactured into marketable product, and to this end can authorize the receiver to contract debts and to issue receiver's certificates therefor, and to order them paid out of the product thus manufactured. (p. 28.)

RECEIVERS—PROTECTION OF PROPERTY—PRORATING EXPENSES.—Expenses incurred by a receiver in protecting the property of the receivership may, in the discretion of the court, be prorated between the parties to the suit according to the value of their respective properties. (p. 28.)

T. G. Jones, C. P. Jones, E. F. Jones, and W. C. Ward, for the appellant.

Brawne & Dryer, J. B. Knox, F. L. Pettus, and H. F. Reese, for the appellee.

²³⁵ **SHARPE, J.** This case is the remaining one of four suits at one time pending between the Alabama Iron and Steel Company and its creditors, in which there was a common receivership. The other three suits have each been dismissed without trial, but the receivership, together with certain intervening claims to property in the receiver's charge, still survives to be disposed of with this suit.

The litigation originated under circumstances substantially as follows: The Alabama Iron and Steel Company, a domestic corporation, was for several years engaged in the manufacture and sale of charcoal pig iron. The appellant, the American Pig Iron Storage Warrant Company, a corporation having its principal office in New York city, did a warehouse business which consisted mainly in the storage of pig iron. Its yard, No. 38, was located near the furnace of the Alabama Iron and ²³⁶ Steel Company (which we will refer to hereafter as the furnace company), near Briarfield, Alabama, and was divided into three

sections, designated, respectively, as "A," "B," and "C." Under its regulations iron, when stored in it, was placed in separate piles, each containing one hundred tons, and marked with letters to identify its location, and with figures to designate its grade. For each of these hundred ton lots the local yardmaster gave to the depositor his certificate, and upon that certificate, when forwarded to the New York office, the storage company issued to whom the furnace company might direct its several warrants for each of such lots, which warrants described the iron covered by it, and stipulated that "this company has received into its storage yard, located as above, and entered in its storage-books in New York in the name and subject to the order of (name of holder) one hundred tons of two thousand two hundred and forty pounds each of pig iron of the brand, grade, and weight represented by this warrant, which will be delivered free on board cars in the yard above named, only on surrender of this warrant at the New York office, properly indorsed and witnessed, with payment of charges as noted below." The storage yard system was availed of by the furnace company for the purpose of borrowing money on the security of its unmarketed iron, the warrants for which could be conveniently used as evidence of a pledge of iron to secure its notes. In some instances of borrowing the storage company and its yard were not resorted to, and the iron was delivered elsewhere in pledge to the lender independently of the storage company. Besides other investors who from time to time made loans to the furnace company upon the security of storage warrants was the storage company itself. In this way it became the pledgee of its own warrants, representing about two thousand one hundred tons of iron in its yard 38.

Until May 26, 1894, E. T. Peter was the storage company's local yardmaster. He was also a director in and the manager of the furnace company. On May 21, 1894, he, as a director in the furnace company, claiming to act by authority of its board of directors, filed a bill ²³⁷ against that company and one of its creditors, alleging, among other things, its insolvency and consequent inability to continue business, and praying among other things for the appointment of a receiver of its property and for the adjustment of its debts.

Under that bill T. J. Peter, who was the president of the furnace company, and the father of that complainant, was appointed receiver, and as such took charge of the furnace company's unpledged property, and subsequently, where a question arose involving the validity of the warrant pledges, he, acting under

orders of the court, took charge of the storage company's yard and the iron therein, consisting of about ten thousand three hundred tons.

The filing of that bill was followed by the filing in the same court of three others including the present one, wherein different creditors of the furnace company sought to reach its property, one of them charging that the first suit was brought collusively to hinder creditors. To each of these suits the receivership was extended under chancery rule 112. While they were pending two intervening petitions were filed, one by R. H. Pfaff, setting up a claim as pledgee of the furnace company to seven hundred tons of iron held by the receiver in the storage yard, and the other by L. and E. Lamar, Minthorne Woolsey, and Frank Moore, claiming a lien by receiver's certificates on iron manufactured by the receiver. From a decree on demurrer to one of the original bills an appeal was taken and was determined in this court: See *Alabama Iron etc. Co. v. McKeever*, 112 Ala. 134, 20 South. 84.

In October, 1897, each of the original suits except the present one was dismissed without trial, but without prejudice to the intervening petitions referred to; and they, together with this suit, were tried and decreed on jointly, and are jointly involved in this appeal.

During the pendency of the several suits, upon petitions of the appellant storage company and other warrant holders, orders of court were made and carried into effect, paying the several warrant holders, except the storage company, by sales to them of the iron apparently covered by their respective warrants. Under the same decretal orders, the storage company was likewise ²³⁸ paid in part, but thirteen hundred tons of iron were reserved to abide the final decree, seven hundred of the same to stand in lieu of that claimed under this original bill, and the remainder in lieu of that claimed by the intervenors.

Joseph Verchot brought this suit, and thereafter, he having died, it was revived in the name of his executrix. It seeks to enforce a pledge of seven hundred tons of iron alleged to have been made to him by the furnace company as security for money loaned on its seven notes each reciting a pledge of one hundred tons of designated iron, and further reciting that "any excess in the value of said collaterals or surplus from the sale thereof beyond the amount due hereon shall be applicable upon any other note or claim held by the holder hereof against us now due, or to become due, or that may hereafter be contracted." It is alleged in substance that after the iron was so delivered in pledge

it was, under the direction of the furnace company's president, wrongfully removed into the storage warrant yard, where interests in it were claimed by other parties defendant.

The demurrer to the bill was properly overruled. Verchot, not having possession of the iron, could not pursue the ordinary way of enforcing his security by a sale of the iron, and his sale, if it could be made, would be embarrassed by the conflicting claims upon it. In such case equity has jurisdiction to determine the rights of rival claimants and to enforce the pledge by judicial sale: 3 Pomeroy's Equity Jurisprudence, sec. 1231; 18 Am. & Eng. Ency. of Law, 674; Sharp v. National Bank, 87 Ala. 644, 7 South. 106; Freeman v. Freeman, 17 N. J. Eq. 44.

There was nothing in the pendency of other creditors' bills to preclude him from proceeding by original bill instead of by intervention under those bills: Alabama Iron etc. Co. v. McKeever, 112 Ala. 134, 20 South. 84.

The statutes requiring chattel mortgages to be in writing and authorizing their registration have no application to a pledge. A pledge differs from a mortgage in that the pledgee must have possession and the pledgor the legal title of the property, while a mortgage passes the title to the mortgagee and may allow possession to ²³⁹ remain in the mortgagor: Jones on Pledges, secs. 4, 7; Geilfuss v. Corrigan, 95 Wis. 651, 60 Am. St. Rep. 143, 70 N. W. 306. Notice to the public of the pledgee's interest in the property is sufficiently given by the possession, which must reside in the pledgee. Such possession, however, to be effective either for notice or to give validity at law to the pledge, must be complete, unequivocal, and exclusive of the pledgor's possession in his own right: Jones on Pledges, sec. 40; Casey v. Cavaroc, 96 U. S. 467; First Nat. Bank v. Caperton, 74 Miss. 857; 60 Am. St. Rep. 540, 22 South. 60. As bearing on the question what constitutes such possession, the reported cases are numerous; but those which can be relied on as express authority are few, since each case is determined upon its peculiar facts.

In this case it is clearly proven that under the agreement of pledge between the furnace company, acting by its president and Verchot, a particular spot of ground belonging to that company and located apart from its own iron yards was tendered by the president and accepted by Verchot for his use, and that a quantity of iron was placed thereon, piled in one hundred ton lots and marked with paint with Verchot's initials. There is nothing to show that any power was reserved or allowed to the

furnace company or its officers or employes either to repledge, sell, use, or have charge of the iron after it was so placed.

It was not essential for the delivery to be made at the time of the contract, and the pledge took effect upon subsequent delivery made in performance of the contract: *Nobles v. Christian-Craft Grocery Co.*, 113 Ala. 220, 20 South. 961; *Denis on Contracts of Pledge*, sec. 136. Considering the character of the property involved, its delivery must be taken as vesting complete possession in Verchot, thereby validating the pledge. The cases of *Allen v. Smith*, 10 Mass. 308, and *Sumner v. Hamlet*, 12 Pick. 76, may be referred to as analogous in principle.

It is proven that T. J. Peter, president of the furnace company, had active charge of its affairs, and that by his direction iron was taken from the Verchot yard and placed in the storage company's yard, and there is nothing ²⁴⁰ to show that Verchot ever authorized or ratified such removal excepting a statement attributed to T. J. Peter, which is hearsay and for that reason incompetent as evidence. There is, however, evidence tending to show that, contrary to the storage company's printed rules, its yardmaster had, in some instances, given certificates upon which warrants were issued to, and pledged by, the furnace company representing deposits of iron in the storage yard before they were actually made. The necessity for supplying the shortage thus created, for which E. T. Peter, the yardmaster, might have been held responsible to the storage company, furnishes a probable motive for so using the iron in controversy. It may be that Peters expected that Verchot would ratify such removal upon restitution made to him from iron to be manufactured, but there is no proof of such ratification. On the contrary, there is evidence tending to show that on being informed of the removal he objected and held to his original contract.

As to the quantity of iron delivered to Verchot on the yard assigned to him, and likewise as to the quantity thence removed into the storage company's yard, the evidence is not clear. Those matters being referred to the register, he ascertained that the entire seven hundred tons were so delivered and removed. The testimony is not in accord as to the quantity removed, neither does it accord as to the time of removal, and the weighing-books in evidence are not shown to have been accurately kept. The testimony can be best harmonized upon the supposition that removals in different quantities occurred at different dates, and that all of such acts of removal were not known to each witness. So viewed the evidence supports the register's findings.

The demurrers to the intervening petitions show no tenable grounds. Such petitions are not required to conform to all the technical rules applicable to pleading as between the principal parties. When filed by leave of court other parties in interest are entitled to notice and an opportunity to defend, but the petition need not name them as defendants, and it needs no formal prayer for process.

²⁴¹ Pfaff's petition presents a case for the most part similar to that of Verchot. He claims as the holder of notes containing agreements for pledges of iron as collateral security transferred to him by C. S. Plumb, who is alleged to have made loans thereon to the furnace company, aggregating five thousand dollars. There is evidence amply supporting the petition and showing that, pursuant to the contracts, iron was set apart to Mrs. Plumb by being placed upon a spot of ground leased to her by the furnace company for that purpose, and was there marked with initial of her name. There is no evidence of any right reserved or allowed to the furnace company, or anyone connected with it, to thereafter use or exercise any control over the iron. This delivery vested Mrs. Plumb with possession, and in that respect fully executed the pledge contract.

It was ascertained by the register upon a reference that three hundred tons of iron were by direction of the furnace company's president removed from the Plumb yard into the storage company's yard and that two hundred tons of same remained on that yard, the warrants describing same being held by the storage company, and that a warrant describing the other one hundred tons had been issued to an innocent holder for value, and that this last-mentioned one hundred tons had been removed from the state, but that there had been another one hundred tons substituted and held in lieu of it in the storage yard.

Though a pledgee does not acquire the legal title to the pledged property, and though relinquishment of his possession will ordinarily defeat the pledge, yet the pledgor cannot accomplish such defeat by wrongfully retaking possession: *Way v. Davidson*, 12 Gray, 466, 74 Am. Dec. 604; *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245. Verchot and Mrs. Plumb, in whose place Pfaff now stands, being without fault, might have recovered possession from the furnace company when the iron was taken by it or its representatives from their respective yards; and the same right of action lay against the storage company after it was held in its yard. Neither the storage company nor its warrant holders, either with or without notice of the pledge, could acquire any greater interest ²⁴² than their transferrer, the

furnace company, had, which was only to have the property after satisfaction of the debts it was pledged to secure: *Burton v. Curyea*, 40 Ill. 320, 89 Am. Dec. 350; *Solomon v. Bushnell*, 11 Or. 277, 50 Am. Rep. 475, 3 Pac. 677. The statute (Code, sec. 4222) regulating the issuance of warehouse receipts was not intended to confer rights upon their holders prejudicial to one whose property is stored without authority: *Commercial Bank v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38, 12 South. 568.

The Lamar, Woolsey and Moore petition involves only matters pertaining to the receivership. Receiver's certificates were issued by T. J. Peter, the first receiver, pursuant to a decretal order authorizing him to borrow money thereon, to pay charges and make repairs on the furnace property, and to convert accumulated raw material into iron, and providing that the certificates should be a lien on the iron to be made by the receiver and its proceeds. These petitioners intervened in the original suits as owners of certain of these certificates, for the protection and enforcement of their respective liens on the remaining receiver made iron, which except about forty tons they alleged had been wrongfully placed in the storage company's yard by the receiver.

Upon a reference to the register he ascertained that about three hundred tons of the receiver made iron had been so placed during the administration of receiver Peter. After examination of the evidence taken and reported by the register, we cannot affirm that he erred in this conclusion. Upon that and other issues submitted to the register evidence, documentary and oral, was taken and appears voluminously in the record. It would be profitless here to discuss it in detail or to pass specifically upon objections to parts of the evidence. The rule is settled that the admission by the register of incompetent testimony will not reverse a decree which is supported by competent testimony, and that the findings of the register upon testimony taken before him will not be set aside when like testimony would support a jury's verdict.

Whether the chancery court has power in cases like the present to subordinate pre-existing liens to those of ²⁴³ receiver's certificates is a question referred to in argument, but it does not arise here. The storage warrant holders had no lien on the receiver made iron. The receiver was given no power to create liens in their favor.

To preserve and make valuable the furnace company's property the court had power, in the interest of that company and its creditors, to direct the discharge of threatening encumbrances and to have its accumulated raw material changed into a mar-

ketable product: *Beckwith v. Carroll*, 56 Ala. 12. It could authorize its receiver to contract debts for such purposes, even without the issuance of certificates, and to make them a charge upon the furnace property: *Thornton v. Highland Avenue etc. R. R. Co.*, 94 Ala. 353, 10 South. 442. It had likewise power to designate a mode for borrowing and for repayment of the money out of the iron to be manufactured by its use, and to transfer the lien so created to other iron, which by the order of the court, acquiesced in and acted upon by the parties, had been substituted for that allowed to be removed from the yard.

We discover nothing inequitable in the apportionment made by the decree of expenses incident to the receivership. The evidence shows that those expenses were reasonably incurred by the receiver chiefly in effecting the issuance and registration of the second series of receiver's certificates issued at the instance of the appellant storage company, among others, and in employing a watchman to guard not only the furnace property, but iron in the storage yard, which may have been, as expressed by the appellant's petition for its sale, "in danger of being taken away by irresponsible parties." It was proper to prorate such expense between the two companies according to the value of their respective properties needing such protection.

In the matters assigned for error there is nothing which should reverse the decree. It will be affirmed at cost of the appellant storage company,

Pledge—Necessity of Delivery.—To make a valid pledge, there must be either an actual or constructive delivery of the property: *Gellfuss v. Corrigan*, 95 Wis. 651, 60 Am. St. Rep. 143, 70 N. W. 806; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, 49 N. E. 592; *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 460, 45 N. E. 760; *First Nat. Bank v. Caperton*, 74 Miss. 857, 60 Am. St. Rep. 540, 22 South. 60. However, the delivery may be symbolic or constructive: See the monographic note to *Lucketts v. Townsend*, 49 Am. Dec. 731-733. The setting apart of property for the benefit of a pledgee is not a sufficient delivery, where he has no knowledge thereof, and never takes possession: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, 49 N. E. 592; *First Nat. Bank v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400.

A Pledge Differs from a Chattel Mortgage in that the legal title remains in the pledgor, even after failure to perform the obligation, only the possession passing to the pledgee, with a qualified power of disposition: See the monographic note to *Lucketts v. Townsend*, 49 Am. Dec. 731; *Gellfuss v. Corrigan*, 95 Wis. 651, 60 Am. St. Rep. 143.

A Pledgee's Remedy for the wrongful taking of the property from his possession is an action for its recovery or for its value: See the monographic note to *Robinson v. Hurley*, 79 Am. Dec. 500.

If a Pledgor Recovers Possession wrongfully, without the pledgee's consent, the pledge is nevertheless valid: See the monographic note to Robinson v. Hurley, 79 Am. Dec. 500.

Collateral Securities in general are considered in the extended note to Griggs v. Day, 82 Am. St. Rep. 711-731.

Receivers.—The power of courts of equity to continue a business under a receiver and to make his charges and expenses a charge upon the property must be exercised with great caution: Makeel v. Hotchkiss, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524. Under what circumstances this power may be exercised is discussed in the monographic note to International Trust Co. v. United Coal Co., 83 Am. St. Rep. 72-80.

JOHNSON v. OLDHAM.

[126 Ala. 309, 28 South. 486.]

ADVERSE POSSESSION.—POSSESSION OF THE HOMESTEAD BY A WIDOW under her right of quarantine after the death of her first husband, and the subsequent possession of herself and her second husband, without a conveyance, is permissive, and not adverse to the heirs of the deceased, unless there is a denial of their rights by declarations, or hostile acts of which they have notice, or which are so notorious and openly exclusive as to afford a basis for imputing to the heirs knowledge of her husband's adverse possession. (p. 30.)

ADVERSE POSSESSION AGAINST HEIRS BY SECOND HUSBAND.—If the second husband of a widow, while occupying with her the premises of her former deceased husband under her right of quarantine, purchases such premises at administrator's sale following proceedings in which the estate of the decedent is declared insolvent, without receiving a conveyance, this does not afford implication of notice to the heirs of the decedent of any hostile claim, or adverse possession, by such purchaser. (pp. 30, 31.)

Ejectment by the heirs of one Carter Oldham, deceased, to recover certain lands. Both plaintiffs and defendant claim under the same source of title. Judgment for plaintiffs and defendant appealed.

J. W. Bush, for the appellant.

J. R. Beavers and E. S. Lyman, for the appellees.

311 McCLELLAN, C. J. According to the undisputed evidence, Mrs. Oldham had possession of the land in controversy from and after the death of her first husband, Carter Oldham, the ancestor of plaintiffs, and up to and beyond the time of her marriage to Wiley Russell, under her right of quarantine as the

widow of said Carter; the premises constituting, in part at least, the residence of the family at the time of the latter's death. It is equally free from controversy that Wiley Russell, the grantor of the defendant, never received any conveyance of this land, and that neither he nor the defendant had or has any title thereto, unless his occupancy of the premises was of that sort which ripens into title upon the lapse of ten years under the doctrine of adverse possession. This it could not be as against these plaintiffs under the facts in this case, because it is in no way shown that they, the heirs at law of Carter Oldham, ever had any affirmative notice that Russell claimed the land as his own and assumed to occupy it as in his own right, or that his possession was of such hostile and notorious a character, so openly exclusive of the right of possession of his wife, the former Mrs. Carter Oldham, as to afford a basis for imputing to them knowledge of his adverse possession. There was no attempt to prove that they had actual notice of any such possession by Russell. The proceedings in the probate court by the administrator of Carter Oldham to have the estate declared insolvent and this land sold to pay debts, wherein there was a declaration of insolvency, and an order for the sale of the land under which it was sold, the sale reported and confirmed, but no conveyance ever executed, were, under statutes then of force, *res inter alios acta* as to the heirs, and afforded no implication³¹² of notice to them: *McGuire v. Shelby*, 20 Ala. 456, 459, 460; *State Bank v. Ellis*, 30 Ala. 478. The acts deposed to by Russell as giving an openly hostile and adverse character to his possession—sufficient, it is insisted, to carry notice to the heirs—were of a character entirely consistent with the continued possession of his wife under her right of quarantine as the relict of Carter Oldham, and had no legitimate tendency to charge the plaintiffs with knowledge that the premises were no longer held permissively under and in subordination to their title. On the case made by the evidence without conflict, so long as Mrs. Russell lived, the occupation of the premises by her husband and herself is referable to her right of quarantine, and her possession, and his also, is to be held to have been taken and continued permissively in recognition of the title of the heirs, and not adversely to that title: *Inge v. Murphy*, 14 Ala. 289; *Shelton v. Carrol*, 16 Ala. 148; *McLeod v. Bishop*, 110 Ala. 640, 20 South. 130; *Foy v. Wellborn*, 112 Ala. 160, 20 South. 604.

The trial court properly gave the general charge for plaintiffs, and the judgment is affirmed.

Adverse Possession.—The possession of a widow, so long as her dower remains unassigned, is not adverse to the heirs: *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 899, 16 S. W. 938; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281, 1 S. E. 625. See, also, *Westmeyer v. Gallenkamp*, 154 Mo. 28, 77 Am. St. Rep. 747, 55 S. W. 281; *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 334, 68 N. W. 243. Her possession, either in her dower or quarantine right, is in subordination to the title of an heir, and, however long continued, no hostile claim of ownership can make it adverse to him: *Stiff v. Cobb*, 126 Ala. 381, post, p. 38, 28 South. 402.

SOUTHERN RAILWAY COMPANY v. HOOD.

[126 Ala. 312, 28 South. 662.]

ESTOPPEL—EJECTMENT—RIGHT OF WAY FOR RAILROAD—COMPENSATION.—If a railroad company, without condemnation proceedings, enters upon land and constructs its roadway thereon without the consent of the owner, but with his knowledge, and he allows the company to expend large sums of money in making such improvements, he is estopped from ousting the company by ejectment, providing it is then willing to make just compensation, but such owner is not estopped from claiming compensation. (p. 33.)

INJUNCTION AGAINST EJECTMENT—RIGHT OF WAY FOR RAILROAD—COMPENSATION.—If a railroad company, without a conveyance or condemnation proceedings, enters upon land and constructs its roadway thereon without the consent of the owner, but with his knowledge, neither it nor its successor can enjoin an action of ejectment against it by such owner without making, or offering to make, just compensation for the land used for such right of way. (pp. 34, 35.)

Bill in equity for an injunction restraining the further prosecution of an action in ejectment. A demurrer to the bill was sustained and plaintiff appealed.

Burnett, Hood & Murphy, for the appellant.

Dortch & Martin, for the appellees.

³¹⁵ **HARALSON, J.** Article 1, section 24, of the state constitution provides that "private property shall not be taken or applied for public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner; provided, however, that the general assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by

general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner."

Article 14, section 7, again, on the same subject, provides that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction."

Agreeably with the provisions of the constitution on the subject, the general assembly long ago enacted legislation for the condemnation of the lands of another by a "corporation organized under the laws of this state, or any person, or association of persons, proposing to take lands, or to acquire an interest or easement therein, for any uses, for which private property may be taken": Code, sec. 1712 et seq. The corporation, person, or persons proposing to take the lands of another for such uses must become the mover or movers in any condemnation proceeding thus authorized. No provision is made for the owner of the land to initiate any such ³¹⁶ proceeding; and at law he cannot compel the payment of compensation for his property before it is taken, injured, or destroyed. Falling back upon his constitutional rights, however, if his property has been taken, injured, or destroyed, without his consent, he may treat the intruder as a trespasser, and bring an action of trespass or an action of ejectment against him, or enjoin him by bill in equity from such unlawful interference, until just compensation has been ascertained and paid: *Jones v. New Orleans etc. Assn.*, 70 Ala. 227, 68 Ala. 48; *Highland Ave. etc. R. R. Co. v. Matthews*, 99 Ala. 27, 10 South. 267. Discussing the same principle in another connection we held that "whenever any person, corporation, or authority, vested with the power of eminent domain, undertakes to exercise such power, by appropriating private property to its own use or benefit, without first complying with the constitution, a court of equity has jurisdiction to enjoin such undertaking, until compensation has been first paid to the owner, his title or interest being admitted or clear, and that without regard to any questions of irreparable injury": *Birmingham Traction Co. v. Birmingham etc. Elec. Co.*, 119 Ala. 129, 24 South. 368, 119 Ala. 137, 24 South. 502.

These well-recognized principles are in no sense qualified or shaded by that other doctrine, so well settled in this court, and in others, that while a railroad company has no right to enter

upon and take possession of the lands of another—without his consent or without having made just compensation therefor in proceedings for the condemnation of the land—does enter and construct its track thereon, and the owner has knowledge that the company is proceeding to locate and construct its road on his land, and allows him to do so, and allows him to expend large sums of money on improvements for such purpose, he will be estopped from ousting the company by ejectment, if the company is willing to then make just compensation, such as its taking involved. While this is clear, it works no estoppel against the owner from claiming just compensation. Nothing short of an acquiescence in an adverse, hostile possession of sufficient duration to toll the entry will ^{§17} bar such a claim: *South etc. R. R. Co. v. Alabama etc. R. R. Co.*, 102 Ala. 236, 14 South. 747; *Cowan v. Southern Ry. Co.*, 118 Ala. 554, 23 South. 754; *Thorn-ton v. Sheffield etc. R. R. Co.*, 84 Ala. 114, 5 Am. St. Rep. 337. 4 South. 197; *East Ry. Co. v. East Tennessee etc. Ry. Co.*, 75 Ala. 280.

The trespass in this case, as shown, was made in the beginning by the Rome and Decatur Railroad Company, which entered on the land of respondents, some of whom were and are infants, and constructed and operated its road. This company went into the hands of a receiver, who sold the road under orders of court, and the East Tennessee, Virginia, and Georgia Railroad Company purchased, went into possession, and operated the same until it also went into the hands of a receiver, who sold under orders of court, when the complainant company purchased, went into, and has continued since in, possession, and is now, as owner, operating the road, carrying freight, passengers and the United States mails. It is not shown that either of these companies ever paid anything for the right of way over respondents' land, nor did either ever institute proceedings under the statute to condemn said land to the uses of said companies or either of them. Under these conditions respondents have instituted their action in ejectment in the law court to recover the possession of their property. There is no pretense that they are not the owners of the fee in the land sued for, nor is there any that they have ever been compensated therefor. It is urged, however, as a basis for the equities of the bill, that respondents ought not to be allowed to eject complainant, since by their failure to assert their rights, they have allowed complainant and the public as well to acquire rights, which a court of equity will not allow to be impaired. It is a bill which asserts an equity and seeks to have it declared. In all such cases the maxim is of special application, that he who

seeks equity must offer to do equity, and thereby give the court jurisdiction to decree against him and in favor of his adversary, so far as equity may require it: *Micou v. Ashurst*, 55 Ala. 607, 611; *American etc. Mtg. Co. v. Sewell*, 92 Ala. 163, 169, 9 South. 143; *Grider v. American etc. Mtg. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58, 12 South. 775; *Giddens v. Bollings*, 99 Ala. 319, 13 South. 511. The defendants in the cause, being the owners of the title, as the bill seems to concede, might ³¹⁸ have filed their bill for compensation, and it would have been sustained and made effective, if necessary, by injunction against the further operation of the road until defendants' damages were properly ascertained and paid, or until the company obtained the right of way in legal form: *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 114; 5 Am. St. Rep. 337; 4 South. 197; *Cowan v. Southern Ry. Co.*, 118 Ala. 554, 23 South. 754. This privilege, however, did not prevent their bringing their action for the recovery of the land, which they were entitled to prosecute to judgment, and the dispossession of complainant, unless it pays just compensation. This is the only principle on which a court of equity can consistently, with its long-established rules of procedure, entertain the suggestion of equity in a bill of this character. Without offering to do so, complainant seeks a large equity on its side, and denies a small one to its adversaries, though the right of respondents find protection in the constitution of the state. The entertainment of such a bill, properly filed, furnishes an illustration of the adaptive powers of a court of equity to meet the new and varied necessities and exigencies of society and the trade and commerce of the country. All equities, of whatever character, may be balanced and settled between contending parties on the golden rules of the court, that he who seeks equity at its hands must appear with clean hands, and offer to do equity to his adversary. Without the application of such rules to this case, the constitution shielding the defendants against the taking of their property would be subverted, and a cardinal principle of equity set aside. Having acquired jurisdiction of such a case on proper bill filed, the court has adequate power to ascertain and decree the amount to be paid as damages: *First Nat. Bank of Gadsden v. Thompson*, 116 Ala. 166, 22 South. 668.

The contention that the complainant, as successor to the Rome and Decatur Railroad Company, is not liable, as was the original company, to pay the compensation to which respondents may be entitled, is entirely wanting in merit: *Cowan v. Southern Ry. Co.*, 118 Ala. 554, 23 South. 754.

Affirmed.

Railroad—Right of Way.—If a land owner waives the tortious taking of his property for a right of way by a railroad company, and elects to regard the act as done under the right of eminent domain, he is entitled to recover compensation for the land thus taken. He is estopped to dispossess the company, and is not entitled to an injunction to coerce payment of the compensation. In such case a court of equity may declare the amount due to be a lien upon the land and improvements, and decree foreclosure of the lien and sale of the property to satisfy such amount: *Florida etc. R. R. Co. v. Hill*, 40 Fla. 1, 74 Am. St. Rep. 124, 23 South. 566; *Cohen v. St. Louis etc. R. R. Co.*, 34 Kan. 158, 55 Am. Rep. 242, 8 Pac. 138. Some authorities maintain that the land owner may bring ejectment: *Daniels v. Chicago etc. R. R. Co.*, 35 Iowa, 129, 14 Am. Rep. 490; *Terre Haute etc. R. R. Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164. Compare *Calro etc. R. R. Co. v. Turner*, 81 Ark. 494, 25 Am. Rep. 564; *McAulay v. Western Vermont R. R. Co.*, 83 Vt. 311, 78 Am. Dec. 627; *Louisville etc. Ry. Co. v. Soldwedde*, 116 Ind. 259, 9 Am. St. Rep. 852, 19 N. E. 111. But in such case the action will be treated as equitable in its character, and execution on the judgment therein will be stayed for a reasonable time to allow an assignment of damages: *Oliver v. Pittsburgh R. R. Co.*, 131 Pa. St. 408, 17 Am. St. Rep. 814, 19 Atl. 47.

MONROE v. ARTHUR.

[126 Ala. 362, 28 South. 476.]

DEEDS—ACKNOWLEDGMENT OF—COLLATERAL ATTACK UPON.—Although a notary public has such an interest in a conveyance as disqualifies him from taking the separate acknowledgment of the wife of the grantor, and renders the conveyance invalid upon direct attack if so acknowledged, yet its validity or admissibility in evidence because of such defective acknowledgment cannot be collaterally attacked. (pp. 36, 37.)

E. J. Symer, for the appellant.

C. E. Powell, for the appellee.

363 McCLELLAN, C. J. This is a statutory real action prosecuted by Arthur against Monroe. Defendant claimed title under a mortgage purporting to have been executed by plaintiff and his wife to Pratt Mines Building and Loan Association. The land at the time this paper was signed, acknowledged, and delivered constituted Arthur's homestead. The separate acknowledgment by Mrs. Arthur of her signature, etc., to the conveyance was taken by T. H. Moore, a notary public, who was then a stockholder in, and the secretary and treasurer of, the grantee corporation. At the trial the court held that this mortgage was invalid, for that the separate acknowledgment of the

wife was made before and taken by a person having such interest in the conveyance as disqualified him to perform and discharge the judicial act he assumed to perform and discharge, and excluded the instrument as evidence ³⁶⁴ in the cause; and thereupon plaintiff had judgment.

That the conveyance is invalid and to be so declared upon proper attack has been determined by this court in the case of *Hayes v. Southern Home etc. Assn.*, 124 Ala. 663, 82 Am. St. Rep. 216, 26 South. 527; and the only question now presented is whether it should have been held void upon the collateral attack made on it in this action. We do not think it should have been so held. The deed was not void on its face, but only because of extrinsic facts resting in parol. These extrinsic facts did not involve any matter for which the execution of the paper could be assailed collaterally, as a mere incident to a proceeding prosecuted for a purpose other than the cancellation of the instrument. In such case the infirmities inhering in the execution of the mortgage can be shown only upon a direct attack on its validity, by which is intended some proceeding begun and prosecuted for the express purpose of having the conveyance adjudged void and canceled—as, for instance, a bill in chancery, setting up the facts as to the notary's incapacity, and praying that the alleged deed be decreed to be surrendered up and canceled, etc., and until cancellation is decreed in such or other direct proceedings, the conveyance will be treated by all courts as valid and efficacious.

For the error committed by the circuit court in determining the invalidity of this mortgage upon an objection to it as evidence in this action for the recovery of the land, the judgment must be reversed. The cause is remanded.

Acknowledgments.—An officer cannot properly take an acknowledgment of a deed in which he is directly interested: *Hayes v. Southern Home etc. Assn.*, 124 Ala. 663, 82 Am. St. Rep. 216, 26 South. 527; monographic note to *Cooper v. Hamilton*, 56 Am. St. Rep. 798-800. On the impeachment of certificates of acknowledgments, see the monographic note to *American Freehold etc. Co. v. Thornton*, 54 Am. St. Rep. 150-159; *Council Bluffs Sav. Bank v. Smith*, 59 Neb. 90, 80 Am. St. Rep. 669, 80 N. W. 270.

STIFF v. COBB.

[126 Ala. 381, 28 South. 402.]

EJECTMENT.—PLAINTIFF IN EJECTMENT CANNOT RECOVER ON THE WEAKNESS of title of the defendant. (p. 39.)

ADVERSE POSSESSION MUST BE EXCLUSIVE, and, therefore, two persons cannot hold the same property adversely to each other at the same time. (p. 39.)

ADVERSE POSSESSION.—HUSBAND AND WIFE cannot hold adversely to each other while residing together on the same tract of land. (p. 39.)

ADVERSE POSSESSION—WIDOW—HEIR.—The possession of a widow, either in her dower or quarantine right, is in subordination to the title of the heir, and, however long continued, no hostile claim of ownership can make it adverse to him. (p. 39.)

ADVERSE POSSESSION—INTENT.—Possession, to be adverse, must be accompanied by an intent to claim ownership in the property held. (p. 39.)

ADVERSE POSSESSION.—EVIDENCE as to who paid the purchase money for land is competent, as tending to show an intent on the part of the person paying it to claim the land as his own during his possession thereof. (p. 39.)

WITNESS—WIDOW AGAINST DECEASED HUSBAND.—Under a claim of ownership and adverse possession by a widow against an heir of her deceased husband, where both parties have occupied the land for many years after the husband's death, evidence that the widow paid for the land out of her own money is not subject to the objection that it related to a transaction with her deceased husband. (p. 39.)

ADVERSE POSSESSION—EVIDENCE—PRIOR CONVEYANCES.—Under a claim of adverse possession perfected by the vendor, evidence that prior to the conveyance by him he had conveyed other portions of the same tract and had executed a prior mortgage on the lot in suit, together with such conveyances and mortgage, are admissible, as tending to show a claim of ownership of the property. (p. 40.)

ADVERSE POSSESSION—EVIDENCE—MANNER OF POSSESSION.—Under a claim of adverse possession it is permissible to prove how or the manner in which the person in possession held or occupied the property. Such inquiry calls for a descriptive fact, rather than for a conclusion as to the claim of adverse possession. (p. 40.)

Action in ejectment by W. C. Stiff against W. A. Cobb and wife, who claim title through Mrs. Jane H. Stiff, the mother of plaintiff. Judgment for defendants and plaintiff appealed.

Burnett & Culli, for the appellant.

385 SHARPE, J. The lot in suit is a part of a block in the town of Centre, on which the plaintiff's parents, M. L. Stiff and

his wife, Jane Stiff, resided together for about ten years next before and at the time of Mr. Stiff's ³⁸⁶ death, which occurred in 1867. The title is not shown to have been in either the husband or wife other than such as could have been acquired by possession and claim of ownership. There is evidence tending to show that the block in question was obtained from one Cole in exchange for lands in the country to which Mr. Stiff had a deed from one McElrath; but though the plaintiff testified on the trial that he had seen a paper writing from Cole to his father, which was probably lost or destroyed, there was no attempt to show the contents of the writing. The plaintiff claims title as the heir of his father, and the defendant, Mattie Cobb, in whose right her husband, the other defendant, rests his defense, claims by a deed from plaintiff's mother, containing terms which by the statute are made to import a warranty of title. Mrs. Cobb's deed was made in 1897, and her possession and claim thereunder, linked by this deed to an asserted previous adverse possession in Mrs. Stiff, constitutes the claim of title upon which the defendants rely.

It is axiomatic that a plaintiff in ejectment must establish title in himself and cannot recover on a weakness of title in the defendant. In order to show title passing to him by descent in the absence of documentary title in his father, it was incumbent on the plaintiff to prove that his father had acquired title by adverse possession of the land during the period of ten years, which, under the statute, would have barred an action for their recovery. Of this there was evidence introduced on the trial, but without objection to her competency on this point, Mrs. Stiff testified that the property was held as hers for about forty years, which covered the period during which it was resided on by her and her husband; and thus a conflict of evidence was produced as to whether the possession was in her or was held in right of her husband.

Possession, to be adverse, must be exclusive, and, therefore, two persons cannot hold the same property adversely to each other at the same time, and for the additional reason furnished by the common-law unity of coverture, Mr. and Mrs. Stiff could not have held adversely to each other: *Gafford v. Strauss*, 89 Ala. 283, 18 Am. St. Rep. 111, and note, 7 South. 248; ³⁸⁷ *Bell v. Bell*, 37 Ala. 536, 79 Am. Dec. 73; 1 Am. & Eng. Ency. of Law, 820. If either had owned the legal title, the law would have referred the joint occupancy to the right of such owner; but in the absence of title in either, it was possible for an adverse possession to have been established in

either. If such possession was in M. L. Stiff, and had ripened into a title at the time of his death, the widow, if entitled to dower, was entitled to hold possession until dower was assigned her: Code, sec. 1515. If her possession originated in her quarantine rights, the fact that she rented out the place for some years did not work an abandonment of those rights: *Inge v. Murphy*, 14 Ala. 289; *Oakley v. Oakley*, 30 Ala. 131. Possession so held by the widow is in subordination to the title of the heir; and however long continued, no hostile claim of ownership will make it adverse to the heir, for possession can only be adverse against one who is in condition to dispute it: *Robinson v. Allison*, 124 Ala. 325, 27 South. 461, 97 Ala. 596, 12 South. 382, 604. If such was the character of his mother's possession, and if dower was never assigned, the plaintiff could have maintained no suit against her for possession until she sold the land, but that event gave him the right to sue her alienee: *Wallace v. Hall*, 19 Ala. 367; 2 *Scribner on Dower*, 59.

Whether the plaintiff's father held an acquired title by adverse possession of the land was, in view of the conflict in evidence, a question for the jury to determine.

An essential element of adverse possession is the existence of an intent accompanying the possession, to claim and have ownership in the property held: *Alexander v. Wheeler*, 69 Ala. 332, 78 Ala. 167. As a circumstance tending to prove such intent on the part of Mrs. Stiff during her possession of the lot in suit, it was competent to show in her an equitable claim arising from an investment of her money in the property for which the lot in question was taken in exchange. The inquiry as to whether Mrs. Stiff's money paid for the land does not directly call for evidence of a transaction with her husband, since deceased, and it must have done so in order to make it objectionable under section 1794 of the code: *Gamble v. Whitehead*, 94 Ala. 335, 11 South. 293; ³⁸⁸ *Wood v. Brewer*, 73 Ala. 259; *Tisdale v. Maxwell*, 58 Ala. 40. Non constat the answer would have relation to a payment of which the decedent never had knowledge, and about which he could not have testified if he had lived.

The sale by Mrs. Stiff of a part of the single connected block of land at a time when she was in actual possession of the whole was an act of ownership which, as a question of fact, might well have been found referable to every part of the block. Likewise mortgaging the land in suit was an act of ownership proper to be looked to in determining the character of Mrs. Stiff's claim. For that purpose the deed and mortgage objected

to, both of which antedated Mrs. Cobb's purchase, were properly allowed to go to the jury.

The interrogatory to witnesses as to how Mrs. Stiff held or occupied the lot called for a descriptive fact as to nature of her occupation rather than for a conclusion as to the adverse character of her claim. Whether answers to the question irresponsively involved such conclusion it is unnecessary to consider, for only the question was objected to.

The absence of any claim to the property on the part of others, including the plaintiff, if a fact, was one bearing legitimately on the inquiry as to whether Mrs. Stiff's occupation was subject to that of her husband during his lifetime, or if not, whether she thereafter consented to hold under the heirs according to the plaintiff's contention.

Whether W. A. Cobb had notice of plaintiff's claim before it was bought by Mrs. Cobb or before it was improved was immaterial to the question of title, and if relevant upon any claim by defendant for improvements, such latter question was eliminated by the finding in favor of the defendants upon the main issue.

What has been said of evidence will show there was no error in giving charges 1 and 3. In each of the remaining charges, the propositions stated are correct.

Let the judgment be affirmed.

In Ejectment the Plaintiff Must Recover on the strength of his own title, not on the weakness of his adversary's: *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402; *Wilson v. Leary*, 120 N. C. 90, 58 Am. St. Rep. 778, 26 S. E. 630; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450, and cross-reference note thereto, 31 S. W. 592.

Adverse Possession.—A husband cannot hold adversely to his wife, nor the wife hold adversely to the husband, premises of which they are in joint occupancy: *Note to Gafford v. Strauss*, 18 Am. St. Rep. 118-115; *Bader v. Dyer*, 106 Iowa, 715, 68 Am. St. Rep. 332, 77 N. W. 469. See, further, *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175; *Potter v. Adams*, 125 Mo. 118, 46 Am. St. Rep. 478, 28 S. W. 490.

Possession, to be Adverse, must be under a claim of right: *Hess v. Rudder*, 117 Ala. 525, 67 Am. St. Rep. 182, 23 South. 136; *Baber v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540, 57 S. W. 719; and be exclusive: *Cook v. Clinton*, 64 Mich. 309, 8 Am. St. Rep. 816, 31 N. W. 317; *Illinois Central R. R. Co. v. Houghton*, 126 Ill. 233, 9 Am. St. Rep. 581, 18 N. E. 301.

Adverse Possession—The possession of a widow, so long as her dower remains unassigned, is not adverse to the heirs: *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399, 16 S. W. 936. See, also, *Johnson v. Oldham*, 126 Ala. 309, ante, p. 30, and cross-reference note thereto, 28 South. 486.

MONTGOMERY BEER BOTTLING WORKS v. GASTON.

[126 Ala. 425, 28 South. 497.]

LEGISLATURE—JOURNALS OF HOUSE—WHAT ARE.—The bound volume kept for a journal of legislative proceedings and filed in the office of the Secretary of State, and not the file of memorandum sheets from which such book is made, constitutes the true "journal" of the house of the legislature to which it relates, and must contain the required entry of proceedings in the enactment of statutes. (p. 50.)

LEGISLATIVE JOURNALS—UNLAWFUL MARGINAL ENTRY.—A marginal entry made in the bound volume of a legislative journal under instructions of the chief clerk of the House of Representatives, after such journal has been filed with the Secretary of State, though honestly done and with the best motives, is an unlawful interpolation of the journal and without legal effect to give vitality to the enactment of a statute. (p. 52.)

Lomax, Crum & Weil and T. G. & C. P. Jones, for the appellant.

Gunter & Gunter and Pillaus, Hannaw & Pillaus, for the appellee.

⁴³⁶ HARALSON, J. The only question we need consider on this appeal, according to the view we take of it, is the constitutionality of the "Act to amend the revenue laws of Alabama," approved February 23, 1899 (Acts 1898-99, p. 164). The other question so elaborately discussed by counsel of the constitutionality of the fourteenth subdivision of section 16 of said act must share the fate of the general enactment, of which it is a part, if that be held to be unconstitutional.

The question raised by the plaintiff on this appeal is, that said act of the 23d of February, 1899, was never constitutionally enacted, and is, therefore, void, because, as alleged, the journal of the House of Representatives shows that after the passage of the bill by the House, it was amended by the Senate, and the Senate amendments were not concurred in by the House by a majority of its members taken by yeas and nays, and the names of those voting for and against said amendments were not recorded in the journal, as required by section 22, article 4, of ⁴³⁷ the constitution, and that a conference committee of the two houses was appointed, and the journal of the House does not show that a report of that committee was made and adopted by the House by a majority of its members voting for and against its adoption, taken and recorded as required by said

section of the constitution. Just here the contention arises between the parties as to what constitutes the journal of the House—the defendant insisting that a certain bundle of papers, purporting to be the fiftieth day's proceedings of the House, which show that on that day said revenue bill was, as contended, constitutionally passed, constitutes the journal of that day's proceedings; and the plaintiff, that two bound volumes in the Secretary of State's office, in which said day's proceedings purport to be recorded, but in which said conference report and its adoption by the House as required by the constitution does not appear, constitute the journal. The former shows that the alleged defect in the legislative proceedings, preventing the bill from becoming a law, does not exist, and the latter, as has been stated, that it does. The fate of the bill, therefore, must depend upon the determination of the question, which of these two—the bundle of papers or the two volumes—is the journal of the House. The said papers and the volumes have been certified to this court for inspection, together with all the evidence in the cause bearing on the question, and are before us in aid of our judicial knowledge as to what constitutes the journal of the House, the same evidence having been introduced in the court below in aid of the judicial knowledge of that court.

The said bundle of papers consists of about one hundred and six pages of paper, fastened together at the upper left-hand corner with a paper brad. The first page is headed "Fiftieth day's proceedings, Thursday, Feb'y. 23d, 1899." The pages are not numbered, and the writing on the different sheets—some of which are shorter than others, and of different quality of paper—is in ink and pencil, black and colored, and in different hand-writings, and much of the contents of the sheets are also in typewriting. It contains many original Senate and two original executive messages, with a statement in pen or ink of the action of ⁴³⁸ the House thereon; also appear rubber stamp memoranda of different transactions of that day's proceedings, and printed slips of the names of the members of the House, alphabetically arranged, showing the yea and nay vote on different propositions by pasting on other sheets a list of the names of members after the words "yea" and "nay," and showing the vote by striking out with pen or pencil the names on these two lists, according to the vote of yea or nay of the members respectively; also original reports and copies of reports of committees pasted on legal cap paper, concluding with the name of the speaker, attested by the clerk.

Among these papers is a sheet of legal cap paper on which is written in pencil the same words and figures that appear on the margin of the page 839 of the second volume of the two bound books certified to us, and claimed by the plaintiff to be the true journal of the House. These papers do not purport to contain the proceedings of any day except the last, or fiftieth, day of the session.

The books referred to were two large well and substantially bound record-books, from two and one-half to three and one-half inches thick, one containing six hundred and the other eight hundred and fifty-three numbered pages of written matter, the volumes being labeled on their backs, "Journal of House of Representatives, Session 1898-9, volume 1 and 2." On the first page of the first volume are written the words, "Journal of the House of Representatives, Session 1898-9. Montgomery, Ala., Nov. 15th, 1898"; the calling of the House to order, the swearing of the members and the usual and customary proceedings of the organization of the House; each page contains a part of the proceedings of the House through each day, and the proceedings of the twenty-fifth day of the session, as appears on the last page of volume 1, are contained on the first page of volume 2. The proceedings of each day from the first to the fiftieth day each, inclusive, follow in regular chronological order, and at the end of the fiftieth day's proceedings in said second volume is the statement that the session adjourned sine die, and is signed by Charles E. Waller, speaker of the House of Representatives, and is attested by Massey Wilson, clerk. It is shown that on ⁴³⁹ page 839 of the second of these volumes the interpolation complained of—which will be set out in full in the report of the cause, and may also be found in the report of the case of *State v. Wilson*, 123 Ala. 259, 26 South. 485—was made on the margin of said page, after the 2d of May, 1899, about two months after the final adjournment of the general assembly, and after said volumes had been placed or filed by the clerk in the office of the Secretary of State.

Charles E. Waller, the speaker, testified for plaintiff that he had examined the second volume of the book above referred to; that his signature as speaker appeared at the end of the writing in this volume; that the two volumes referred to are the journal of the House of Representatives for the session of 1898-99, and that the proceedings transcribed into said books were signed by him a day or two after the adjournment of the session; that he signed the books as the original journal of the House of Representatives; that the clerk of the House kept on a board re-

ports of committees and other papers, and from that (the reports and papers on this board) the journal was made, and that journal was just like a clerk would write what had taken place; that the clerk kept a file, already referred to, on which were the reports of committees and other papers, and he signed that also, to go to the printer; that the journal of the House is correct history of what takes place in the House, and "has no business with the original reports on it, and does not contain the original papers." Said Waller also testified that the last day's proceedings of the House were never read therein; that he had no knowledge that these books were ever in the House; that the clerk never kept but one journal, and no other journal was ever presented to the House as its journal in any shape or form except the bound volumes, and that the papers referred to which the clerk kept on a frame were the data from which he had to write up the journal.

Massey Wilson, the clerk, testified for defendant that he kept a journal of the proceedings of the House on the fiftieth day; that the first thing he did with this—the fiftieth day's proceedings (in manuscript sheets) ⁴⁴⁰ —was to turn it over to a clerk to be copied into volume 2 of the book testified about by others in the cause, and that he then sent it to the state printer at Jacksonville, Florida. This is the batch of papers above described and claimed by defendant to be the journal of the House. Witness explained these papers by stating—to use his own language—that "as a step was taken in the House, a note was made of it, and after the House adjourned, I got it out and would write it up, and in doing that, if I could get some of the notes and use them by pasting them on the back of sheets, I would do it, and sometimes I would use a little rubber stamp when I could. These papers contain substantially or actually the same thing as appears on the marginal entry on page 839 of the book. These papers were made out first and the book copied from it; the papers were signed a very few days after we made them up. . . . I put the clerk to making up the book [copying it] about ten or twelve days after the legislature first convened; the House had ten or twelve days' proceedings when I first began copying that book. This whole book [referring to the book which witnesses for plaintiff testified about] is a transcription of the original papers—the papers that I made up daily, and which papers I sent to the state printer. I have seen these books [referring to the books introduced in evidence by plaintiff]; that is my signature at the end of that book [volume 2]. After it was signed I left the books [volumes 1 and

2] in the office of the Secretary of State. . . . I never deposited with the Secretary of State the journal which I kept. The balance of this [referring to the papers kept by this witness, and introduced in evidence by defendant] is now in the hands of the printer in Jacksonville, Florida. . . . I wrote the printer, after this suit begun, to send me by express these papers [referring to the papers which this witness testified he kept as the journal of the fiftieth day's proceedings]; the printer wrote in reply that he had forwarded them, and when I got here this morning I received the papers from the Secretary of State, but they reached the Secretary of State last night. . . . I never gave the printer in Florida or anyone else any directions to ⁴⁴¹ send these papers, or any part of them, back to me until a week ago, but I directed the printer to preserve them, every sheet of them. It [the batch of papers] is the journal I sent the public printer. I get pay for copying; I was paid four hundred dollars. I know how the marginal entry on page 839 of the second volume of the books introduced by the plaintiff came there; I directed it to be made shortly after the convening of the last extra session of the legislature."

Section 13 of article 4 of the present constitution contains the provision that "each house [of the general assembly] shall keep a journal of its proceedings, and cause the same to be published immediately after its adjournment, excepting such parts as, in its judgment, may require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-tenth of the members present, be *entered on the journals*. Any member of either house shall have liberty to dissent from, or protest against, any act or resolution which he may think injurious to the public or an individual, and have his reasons for his dissent *entered on the journals*." The words "entered on the journals," where they occur above, we have italicized for more convenient reference, as will be the case further on in this opinion, where we italicize in any quotation the words of the constitution or statutes of the state. In like manner, section 21, of the same article, requires the names of the members voting on the final passage of a bill to "*be entered on the journals*"; and section 22, requiring that no amendment to bills by one house shall be concurred in by the other, except by a vote of the majority thereof, taken by yeas and nays, and the names of those voting for and against, recorded upon the journals. Section 27 requires that the fact of the signing of bills and joint resolutions passed by the general assembly "*shall be entered on the journal*." Section 13 of article 5, in respect to

the veto of the governor, requires that his objections to the measure vetoed shall be returned to that house in which it originated, "*who shall enter the objections at large upon the journals*"; and again, in the same section, in requiring, in case the bill is passed over the veto, that "the names ⁴⁴² of the members voting for or against the bill *shall be entered upon the journals of each house respectively.*"

The statutory provisions in reference to the journals of the two houses are as follows (Code, sec. 2221): "At the close of each session the secretary of the Senate and the clerk of the House of Representatives and Secretary of State must select all the papers belonging to the general assembly, except such as relate to unfinished business, and deposit them in the office of the Secretary of State."

Section 2222: "The engrossed copies of all laws and joint resolutions passed by the general assembly must be preserved by the chairman of the enrolling committee, and deposited in the office of the Secretary of State."

Section 2223: "The secretary of the Senate and clerk of the House of Representatives must, within ten days after the adjournment of each session, assort all the papers and documents of their respective houses, relating to the unfinished business of the session, and arrange them as follows" (designating the class of papers).

Section 2240: "Within forty days after the adjournment of any session of the general assembly, the secretary of the Senate and the clerk of the House of Representatives must file and arrange the papers of their respective houses in the office of the Secretary of State and copy and deliver to the public printer the journals of their respective house, with proper indexes thereto, and for such service, when performed, they shall receive, respectively, the sum of four hundred dollars."

Section 1974: It is the duty of the Secretary of State (amongst other things prescribed) "to keep the state seal, the original statutes and public records of the state, the records and papers belonging to the general assembly, keeping the papers of each house separate."

The foregoing are our constitutional and statutory provisions touching the question of the kind of journal the houses of the legislature are required to keep.

We have decisions bearing on the question, to which reference must be made. It seems no doubt ever before arose in the legislature or professional mind as to what constitutes the journal. That one was required by law ⁴⁴³ to be kept, and what it should

contain all agree, and when, in judicial utterances, the journal has been referred to, it was done, as if everywhere and generally it was known what was meant by the term "journal." Whatever else it may mean it certainly does refer to the record which the legislature keeps and is required to keep of its proceedings, and like all other records required by law to be kept, it imports absolute verity: *State v. Buckley*, 54 Ala. 613. It is one, and not two or duplicate journals or records, that must be kept; and it cannot be that both the batch of papers and the two bound volumes—placed before us from the Secretary of State's office—together constitute the journal of the House. The one or the other is the journal required by law to be kept: *State v. Wilson*, 123 Ala. 259, 26 South. 485. In that case, involving in another form the matter here complained of in respect to the alleged interpolation into the journal of unauthorized matter, we said: "It cannot be doubted, we think, and it is indeed quite obvious, that the clerk's official connection with the original journal—except the duty of copying it for the printer—ceases upon his delivering it to the Secretary of State for safekeeping after it has been signed by the speaker and himself. From and after that time he has no custody of it, no control over it, no right to its possession except for the specific purpose above referred to, no power to alter it nor to prevent others from altering it and is under no duty to keep it safely or to preserve it from mutilation or interpolation." This extract from that case is indulged to show that the journal, whatever it may be, is the one record required by law to be filed with the Secretary of State as the journal, as well as to show that it cannot thereafter be amended or added to by the clerk. All our decisions refer to this memorial in the Secretary of State's office as the record to which courts will look in ascertaining at last whether a statute has legal existence. In *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28, it was held that the journals of the two houses of the general assembly are public records, of which the courts will take judicial notice, and if it appears from them that an act was not passed according to the forms of the constitution, it will be held not to have the ⁴⁴⁴ force of law. In that case it appears from the opinion that the court examined the journal of the Senate at pages 458, 524, and House journal at page 560, in aid of their judicial knowledge. In that examination of the journals they gave the place in the Senate journal, containing the matter with which they had to do, as at page 458, showing that the journal was in the form of a record, with numbered pages: See, also, *Moog v. Randolph*, 77 Ala. 599; *Jones v.*

Hutchinson, 43 Ala. 721. In *Wilson v. Duncan*, 114 Ala. 668, 21 South. 1017, it appears the court examined the legislative record on file in the office of the Secretary of State, called the journal, to correct an error in the published acts: See, also, *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 72 Am. St. Rep. 928; 24 South. 516. In *State v. Wilson*, 123 Ala. 259, 26 South. 485, where the integrity of the journal was assailed and sought to be corrected, in reference to this same interpolation upon its margin, the alleged change was referred to in volume 2, page 839, and this book was also referred to, throughout, as the journal, though it must be added the question of what constituted the journal was not raised in that case.

For an inspection of the legislative records in the office of the Secretary of State, in aid of our judicial knowledge, we ascertain that in each of the cases above referred to, when the pages of the journals were given by the court, the number of these pages, with an error in one instance, which may be presumed to be typographical, are correctly stated as appear in well-bound volumes similar to the ones before us for inspection in this case.

Mr. Cushing, in his *Law and Practice of Legislative Assemblies*, section 415, says: "The official record of what is 'done and past' in a legislative assembly is called the 'journal.' It is so called because the proceedings are entered therein, in chronological order, as they occur from day to day; the business of each day forming the matter of a complete record by itself; hence, the record is frequently spoken of in the plural as the journals. . . . In the two houses of parliament the clerks take minutes of all the proceedings, orders, and judgments of their respective houses as they occur, and make short entries of them in their minutes. . . . ⁴⁴⁵ From these, and from the papers on file, it is the duty of the clerks afterward to prepare the journals, in which entries are made at greater length, and with the forms more distinctly pointed out. . . . All persons may have access to the journals of the two houses in the same manner as to the records of courts": Cushing on *Law and Practice of Legislative Assemblies*, sec. 416. The same author furthermore says (section 422): "A record or minute of the proceedings of a deliberative assembly of any kind is so essential to the convenient and efficient exercise of its functions, that it must be considered as a necessary incident to the existence of everybody. But the importance of having and preserving such a record of the votes and acts of a legislative body in a form accessible to the public has been considered so great in this country as to be required by express constitutional provision." Still

again he says (section 327): "The clerk and his assistant attend at the table and take notes of the orders and proceedings; from which the votes, as they are called, are made up and printed each day, agreeably to the order of the House 'under the direction of the speaker.' At the end of the session, it is the business of the clerk to see that the journal of the session is properly prepared and fairly transcribed from the minute-books, the printed votes, and the original votes as have been laid before the House.

. . . . The phrase 'to keep a journal' seems borrowed from the technical language as the keeping of a journal corresponds to the practice of mercantile bookkeeping": Cushing on Law and Practice of Legislative Assemblies, sec. 423.

In the case of *State v. Smith*, 44 Ohio St. 348, 4 N. E. 447, 12 N. E. 829, where the question was as to whether an act had been constitutionally adopted, the court, touching the question as to whether resort might be had to parol evidence to impeach the validity of its adoption, said: "Counsel have exhibited unusual industry in looking up the various cases upon the question; and out of a multitude of citations no one is found in which any court has assumed to go beyond the proceedings of the legislature, as recorded in the journals required to be kept in each of its branches, on the question whether a law has been adopted. And if reasons for this limitation upon judicial inquiry in such matters have not ⁴⁴⁶ generally been stated, it doubtless arises from the fact that they are apparent. Imperative reasons of public policy require that the authentication of laws should rest upon public memorials of the most permanent character. They should be public, because all are required to conform to them; they should be permanent, that rights acquired to-day upon the faith of what has been declared to be law shall not be destroyed to-morrow, or at some remote period of time, by facts resting only in the memory of individuals."

As to the journals of the general assembly required by the laws of this state to be kept, it may be said that the constitution and statutes as plainly imply as if they had contained the express language that these journals shall be in permanent, substantial book form, written or printed in ink. Thereby their greater accessibility and convenience to their contents by all the public can be promoted, their keeping and handling rendered safer and easier, and their permanent preservation the better secured. All these considerations enter into the matter of keeping the journals, as required by law. Common and judicial knowledge alike assure us that such has been the manner of making up and keeping these journals during the history of the

state. Such journals as these are found and preserved in the archives of the state, for the examination of courts, lawyers, and all interested parties. No other form of preserving the original legislative history of the state would subserve the constitutional and legislative requirements. Words are to be construed in their popular sense—the plain sense in which the people generally understand them—unless it plainly appear from the writing in which they appear that they were intended to be employed in some other sense: *Harrison v. State*, 102 Ala. 170, 15 South. 563. That the word “journal” in popular use, and according to popular understanding, means such books as are kept for a journal of legislative proceedings in the Secretary of State’s office, and not to a file of memorandum sheets from which it was made up is too clear for dispute. This is in keeping, also, as we have seen, with similar requirements in respect to the journals of legislative bodies elsewhere, with no more ⁴⁴⁷ definite directions as to their keeping than ours, and is consonant with authority, public policy, and common sense. What claims, let it be asked, has the batch of papers before us to be declared the journal of the House? It is as unsubstantial, as wanting in durability, convenience, and qualities as a journal of legislative proceedings as can well be devised. As has been said, its pages are not numbered, and it is difficult of handling and examination, is not in proper documentary shape even for filing, and, as the evidence clearly establishes, was never gotten up or considered as a final journal, such as the law directs to be kept. If so, why did the clerk send it off to the public printer at Jacksonville, Florida, as a transcript of the journal, required by law to be made, from which to print the volume of legislative proceedings, called the printed journal? Section 2240 of the code required him, within forty days after the adjournment of the session, to copy and deliver to the public printer a copy of the journal of the House, and for such service he was entitled to receive four hundred dollars. The clerk swore he sent this batch of papers and similar batches of the other days’ proceedings of the session to the printer in Florida without any instructions to return them, and not until the purposes of this suit required it was this particular batch ordered back by him. The other batches, as he shows, are still in Florida, and he never deposited these as the journal with the Secretary of State. He says, also, he received for these papers the compensation allowed by law for a copy of the journal for the printer. If this was the original, what business had the printer in Florida with it, and if not a mere copy of the original, how could the clerk treat it as a copy and get pay for making

it as such under the statute? It clearly appears from his own evidence, as well as from the speaker's, that he got it up to answer the purpose of a copy and to save himself the labor of making a transcript of the original journal as contained in these two volumes before us. He sent it off as a copy and got pay for it as such, and, so far as appears, without intending reflection on the clerk, it was never thought of as the legislative journal until the necessity of this suit suggested it.

⁴⁴⁸ It may be asked again, how can such parts of the legislative proceedings as are required to be "entered on the journals," to be "entered at large on the journals," to be "recorded upon the journals," find a place in such a batch of papers as this? To "record" means to recite, repeat, and, in the sense used in the constitution, to transcribe something upon the journal. To record and to enter upon are used synonymously in the constitution, and it is past the reasonable comprehension of the judicial mind to understand how a mass of papers tacked together as these are, and for the purposes intended, can furnish a convenient, permanent, and safe receptacle for entering and recording the legislative proceedings required under our law. The tacking together of such papers is not the entry or recording upon the journals spoken of in the constitution.

Aided and instructed by the evidence before us, we declare as of our judicial knowledge that these books before us constitute the true and legal journal of the House of Representatives for the session of 1898-99, and said batch of papers cannot, in any sense, be considered as such. The journal shows that said conference report on the Senate amendments to the revenue bill were never concurred in by the House in the manner required by the constitution to make it a legal enactment, and for that reason the entire act must be held to be void and of no effect.

The writing on the margin of this journal at page 839 of what purports to be the conference report of the two houses and its adoption by the House, placed there under the instructions of the clerk, however honestly done and with the best of motives, which we do not question, was an unlawful interpolation of the journal, and is without any legal effect to give vitality to the enactment of said revenue bill: *State v. Wilson*, 123 Ala. 259, 26 South. 485.

It follows, the court erred in refusing to give the first six charges requested by plaintiff, and in giving the charges numbered 1 and 2 requested by defendant; and that it did not err in giving the charges numbered 1 and 2 requested by plaintiff.

The judgment will be affirmed on the cross-appeal of J. B. Gaston as ⁴⁴⁹ judge, etc., and on the original appeal the judgment of the court below will be reversed and the cause remanded.

Legislative Journals as Evidence of the passage and enactment of statutes are considered in the monographic notes to Carr v. Ooke, 47 Am. St. Rep. 814-823; Jones v. Jones, 51 Am. Dec. 616-623. Consult, also, State v. Swan, 7 Wyo. 166, 75 Am. St. Rep. 889, 51 Pac. 200.

HALL v. HENDERSON.

[126 Ala. 449, 28 South. 531.]

A CORPORATION HAS NO POWER TO PURCHASE ITS OWN STOCK, if the purchase is made with intent to injure its creditors or to defeat them in the collection of their claims, or if it has such effect. (p. 55.)

RECEIVER—JUDGMENT IN FAVOR OF DISCHARGED.—If, pending an action on a note by a receiver, the receivership is terminated, but the action goes on to judgment in the name of the receiver, the judgment is not for that reason void. (p. 56.)

JUDGMENTS NOT VOID ON THEIR FACE are not open to collateral attack. (p. 57.)

ACTIONS—PARTIES.—Under a statute providing that an action must be in the name of the real party in interest, an action by a trustee is in the name of such party, if he is entitled to the money and can discharge the debtor, although the money when collected is held for the benefit of another. (p. 57.)

JUDGMENTS—ACTIONS ON.—If the assignor and assignee of a judgment join in a creditor's bill thereon, it is not necessary that it allege a formal transfer of the judgment, nor is proof thereof necessary. (p. 57.)

CREDITOR'S BILL—PLEADING.—In a bill by judgment creditors of a corporation against it and another, who is alleged to have been an officer of the corporation, and to have sold his stock, directly or indirectly, thereto, knowingly receiving assets thereof in payment therefor, a demurrer for uncertainty, in that the bill does not allege what assets of the corporation were received by such officer or when, is not well taken, as the bill need not allege evidential facts. (p. 57.)

CORPORATIONS—TRANSFER OF STOCK TO—INSOLVENCY.—If a stockholder in a corporation transfers his stock thereto, directly or indirectly, and knowingly receives corporate assets therefor, it is immaterial in a creditor's suit on a judgment against the corporation whether the latter was solvent at the time of the transfer, as such transfer is void against creditors in any event. (p. 58.)

CORPORATIONS—TRANSFER OF STOCK TO—NOTICE.—If an officer in a corporation sells his stock therein, taking notes in payment which are paid by checks drawn by other officers in the

corporation and signed by them in their official capacity, and known by the seller to be such officers, he is chargeable with notice that he was receiving funds of the corporation in payment for his stock. (p. 58.)

ESTOPPEL IN PAIS MUST BE PLEADED and the facts supporting it clearly made out by the person relying upon it. It can never arise from ambiguous facts, and must be established by such as are unequivocal and not susceptible of two constructions. It cannot rest in mere inference or argument, but must be a precise affirmation of that which makes it. (p. 62.)

CORPORATIONS—OFFICERS—DERELICTION OF DUTY. An officer in a corporation whose duty it is to make entries in its books cannot, as against creditors of the corporation, avoid the probative effect of such entries by invoking his own dereliction of duty. (p. 64.)

CORPORATIONS — DIRECTORS—PRESUMPTIONS AGAINST.—The directors of a corporation, so far as the rights of third parties are concerned, are conclusively presumed to know its financial condition, its business, its receipts and expenditures, and all the general facts which go to make up its condition and business, as shown by the entries on its regular books. (p. 64.)

Gunter & Gunter, Watts, Troy & Caffey, and J. M. Chilton,
for the appellants.

Harmon, Dent & Weil, A. A. Wiley, and W. S. Thorington,
for the appellee.

⁴⁸⁰ **TYSON, J.** We shall first dispose of the questions raised by the assignments of error on the cross-appeal.

When this case was here on former appeal (*Hall v. Henderson*, 114 Ala. 601, 62 Am. St. Rep. 141, 21 South. 1020), the equities of the bill were fully discussed and settled. In the opinion delivered, the averments of the bill are set out in extenso, and the two theories under which relief is sought are pointed out and shown not to be inconsistent or repugnant, the one with the other. The purpose of the bill under the second or alternative aspect presented in it is to seek satisfaction of the complainants' demand out of the debtor's property, which is alleged in effect to have been fraudulently conveyed or attempted to be placed beyond the reach of execution. Or to state the proposition in another form, it is to subject to the satisfaction of complainants' debt equitable assets in the hands of Henderson which have been converted by him. For if it be true, as averred, that Woolfolk and Saportas, as officers of the corporation, the Alabama Terminal and Improvement Company, purchased the stock of Henderson ⁴⁸¹ in that corporation for that company, and Henderson was paid for it out of the assets of the corporation, with notice, though perhaps binding inter partes, which, however, we do not here decide, it is very certain that it was voidable at the instance

of creditors of the corporation, as a fraud upon them, if the corporation's ability to pay its debt was impaired by the transaction. This is not upon the principle that the assets of a corporation are trust funds to be held by it as a trustee for the benefit of its creditors, but is rested upon the doctrine that it is a voluntary conveyance or transfer as against creditors by the corporation to its stockholders of its assets. A business corporation primarily has no assets other than those which it derives from the subscription to its capital stock. In organizing it, and subscribing for shares of stock, the stockholder acquires simply "a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts": Cook on Stock and Stockholders, sec. 5, note 1. A stockholder has no right to demand that the corporation pay to him the value of his stock, nor has the corporation any legal right to do so as against creditors. Its obligation to redeem its stock can never arise until dissolution, and, even then, it is subordinate to its obligation to pay its creditors. To permit a corporation to purchase without restriction shares of stock issued by it would, in effect, license stockholders, by resorting to sales of their shares to it, to deplete the assets of the corporation, and give to them a preference over creditors which was never contemplated, and to confer upon them a right which they never contracted for, and to which they were not entitled when they made the contract by which they became the owners of their shares, nor at the time the creditor extended to the corporation. A permissive recognition of the unrestricted right of a corporation to purchase the shares of one of its stockholders, as against creditors, necessarily concedes the same right to the corporation to purchase the entire capital stock. If this ⁴⁸² right be accorded a corporation, and it is exercised to its full limit, we would have the case of a corporation having distributed its entire capital to its stockholders, leaving it as the owner of its own promises obligatory with which to pay its debts to its creditors. Of these, it would seem, the creditors had a sufficiency. At least, more promises made to the creditors would add no value to those already held by them. Indeed, an examination of the general statutes on the subject of creating corporations and regulating their organization will disclose that they require a certain per centum of the proposed capital stock to be paid by the subscribers, and their written obligation executed and delivered to some one for the balance of their subscription, usually denominated commissioners, before a charter is granted: See Code, c. 28; distinctly

showing that their policy is that no fictitious corporations shall exist in this state. That when a corporation is organized and authorized to do business under our laws, those who deal with it may do so upon the assurance that its capital has been either fully paid up or the corporation has the written obligation of its subscribers as assets, out of which the money due to it by them may be realized. To say that these subscribers, after paying up their subscription obligations, may make a sale of their stock to the corporation, and withdraw the money paid by them to the corporation would not only be a fraud upon the creditors of the corporation, but upon the law. Of course, should such a course be adopted by the unanimous consent of all the stockholders, and there are no creditors, there would be no one to complain.

We are aware that the courts of this country are divided upon the question as to the power of corporations to acquire and hold its own stock. But in no jurisdiction is the power of a corporation to purchase its own shares sustained, if the purchase is made with the intent to injure its creditors or to defeat them in the collection of their claims, or if it has such effect: 7 Am. & Eng. Ency. of Law, 818-820, and notes.

⁴⁸⁸ We have said this much on the subject of the power of corporations to acquire and hold their own stock in order that we may clearly have in mind the scope of the bill, and in order that we may deal intelligently with the issues tendered by its averments. We have made no mention of the first theory presented by the bill based upon the averment that Henderson has not paid his subscription note executed by him to the Alabama Terminal and Improvement Company for stock. This is unsupported by the testimony in the case, and is not insisted upon as a ground for relief.

After the cause was reversed on the former appeal, the bill was amended by incorporating into it the averment that the complainants became the owners of the debt held by the Farley National Bank against the Alabama Terminal and Improvement Company, with the right to collect the same for the benefit of the stockholders of said bank, and also by making H. M. Hall a party complainant in whose name the indebtedness of the bank against the Alabama Terminal and Improvement Company was reduced to judgment. After these amendments were made, a number of grounds of demurrer was assigned to the bill as amended. It is argued in support of the sixth and seventh grounds that the judgment in favor of Hall, as receiver, is a nullity, because the averments of the bill show his discharge as receiver before the rendition of the judgment and the assets

of the bank returned to it and transferred to the other complainants, Hall and Farley, as trustees. The argument is that the suit in which the judgment was recovered abated by reason of Hall's discharge as receiver, and therefore the judgment was void. The insistence is that section 26 of the code requires all suits to be prosecuted in the name of the parties really interested. But the exception made by the statute is that in actions upon bills of exchange and promissory notes payable at a bank or banking-house, or at a designated place, and other commercial instruments, the suit must be instituted in the name of the person having the legal title. We will presume in support of the judgment that such was the character of the instrument sued upon and evinced the debt for which the judgment was rendered. ⁴⁸⁴ If Hall had not the right or capacity to maintain the suit, the defendant corporation should have availed itself of it by proper defenses. It is certainly not void on its face, and, therefore, not open to an attack collaterally.

The case of *Rice v. Rice*, 106 Ala. 636, 17 South. 628, answers the contention made in support of the eighth, ninth and tenth grounds of the demurrer, that the cestuis que trust of Hall and Farley, as trustees, should be parties to this cause.

The making of H. M. Hall a party complainant relieved the necessity of any averment of a formal transfer or assignment of the judgment, or proof of such assignment or transfer; nor did it bring the case within the application of the general doctrine that all complainants must recover or none can. These principles are settled in the following cases: *Gunter v. Williams*, 40 Ala. 572; *Blevins v. Buck*, 26 Ala. 292; *Plowman v. Riddle*, 14 Ala. 169, 48 Am. Dec. 92; *McLane v. McLane*, 19 Ala. 180; and it will serve no purpose to discuss them at length. This disposes of the eleventh and twelfth and first grounds of demurrer to the bill as amended by making Hall a party.

It is stated, in brief, in support of the first, second, third, and fourth grounds of demurrer to the alternative phase of the bill, that they should be sustained because the averments of the bill are too indefinite and uncertain, in that it fails to show when the assets were received by Henderson, what the assets consisted in, how they were received, whether as director and treasurer of the company in his official capacity, or whether in his individual capacity, and whether all were received at one time or at different times. These are matters peculiarly within the knowledge of the Alabama Terminal and Improvement Company and Henderson, the respondents to the bill. We do not understand it to be a rule of pleading that the evidential facts upon which the

pleader relies shall be set forth in his pleading. The charge is, that Henderson, subsequent to January 5, 1891, being a director and treasurer of the company, received assets of said company amounting to \$30,000, or other large sum, ⁴⁸⁵ knowingly, and without proper and legal consideration to said company, which he is liable for with interest. The preceding averments of the bill sufficiently disclose the relations of all the parties to each other, the liability of Henderson to the company in the sum of \$30,000 on account of his subscription for stock, the sale of the stock by him, either directly to the company, or indirectly to it through Woolfolk and Saportas. And, indeed, a liability on the part of Henderson in receiving the assets of the corporation in payment for his stock. It is manifest from this statement that there is no merit in these grounds of demurrer.

The fact of the insolvency of the Alabama Terminal and Improvement Company is sufficiently proven by the evidence. But this fact is immaterial under the view we take of this case; for if it be true that Henderson received the assets of the corporation knowingly or under such circumstances as to put him upon inquiry that the money paid to him for his stock was the money of the corporation in consideration of a sale by him of the stock to the corporation direct, or through Woolfolk and Saportas to the corporation, or if the consideration inuring to the corporation was his stock, then it is in effect a gift by the corporation to him of its assets, which is fraudulent as to creditors, whether the corporation was actually insolvent at the time the bargain for the sale of the stock was made or not. There can be little doubt, if that were important, that it was on the road to financial disaster when the alleged sale was made, and was hopelessly insolvent long before Henderson received many of the payments made to him: Morawetz on Corporations, secs. 793, 794. Nor do we understand the fact to be controverted that all the money Henderson received on account of his alleged sale of the stock was paid out of the assets of the corporation. There is no room under the evidence for such a disputation, for it points with unerring certainty to this conclusion.

The chancellor rendered a decree against Henderson for \$8,719.61, and interest, and refused to charge him with the other money, assets of the corporation, received by him. In dealing with Henderson's liability, he ⁴⁸⁶ did so as though Henderson had no connection with the company as director and as its treasurer. He bases his decree upon the proposition that the checks evidencing the various sums which aggregate the \$8,719.61 gave actual notice to Henderson that he was receiving assets of

the corporation. The contention of Henderson's counsel is that in this there was error. A long and ingenious argument is made to show that many of these checks were drawn by Woolfolk and others as individuals, and were not binding obligations upon the Alabama Terminal and Improvement Company, and therefore they were insufficient to convey notice to Henderson that he was receiving money belonging to the corporation, and not to those persons whose names appeared as drawers. It is sufficient answer to all this to say that these checks were paid out of the funds belonging to the company, and that they bore on their face the appearance of being drawn by officers or agents of some principal upon a deposit—not the money of the agents, but of their principal. A number of them were signed "J. W. Woolfolk, Prest.," and others were signed "J. W. Dimmick, Vice-Prest." Each of these named persons were officers of the Alabama Terminal and Improvement Company, which was correctly designated by the words following their respective names. As a director and officer of the same corporation, Henderson was bound to know, and did know, that they were acting in that capacity in signing these checks. These indicia on the checks, had he heeded the inquiry which they naturally suggested, would have led him, upon investigation, to a knowledge that it was funds of the corporation upon which they were drawn, and out of which he was being paid for his stock, which he says he sold to Woolfolk and Saportas: *Wolffe v. State*, 79 Ala. 206, 58 Am. Rep. 590, and authorities there cited.

The remaining contention made by Henderson, the cross-appellant is predicated upon an estoppel which is alleged in his answer, and which he insists is supported by the proof in the cause. We quote from his counsel's brief as showing what defense is alleged in the answer: "The answer in this case, filed May 15, 1897, and refiled with the amendment April 16, 1898, in the sixth paragraph on page 6, sets up as a defense that Henderson ⁴⁸⁷ transferred his shares of stock to Woolfolk, and Woolfolk, for the company, transferred the same to the Farley National Bank as collateral security for a part of the debt on which this suit is founded, and the Farley National Bank transferred the same to the complainants in this case, and that they hold it, and have never returned, or offered to return, said stock to Henderson or to Woolfolk, and that they had full knowledge of the facts at the time they received said stock, or that they have retained the same after obtaining full knowledge of all of the facts."

If we treat the insistence as laid in argument that the proofs sustain the averments of the answer, the whole matter might be

disposed of by pointing out the fact that the evidence shows that this stock stands in the name of one John W. Hess, and has never, as a matter of fact, been transferred to these complainants. True, the assignment to Hall and Farley, as trustees, shows four hundred shares of stock are embraced in it. But the record shows that the corporation had purchased quite a large amount of its stock from other stockholders. Whether this four hundred shares mentioned in the assignment is the stock bought of Henderson or the other Troy stockholders does not clearly appear from the evidence. But aside from this, in the transaction between Henderson and Woolfolk, which is shown to have taken place about March 13, 1891, by which this stock was surrendered by Henderson to Woolfolk, Henderson got in lieu of it bonds as collateral security. The bank is not shown to have been a party to the negotiations between them which resulted in this exchange of securities, or to have had anything whatever to do with it, except to become the transferee solely for the purpose of becoming a conduit by which the Chatham National Bank of New York City might become its owner as the property of Woolfolk. This purpose is clearly disclosed in Woolfolk's letter to Henderson. But conceding that the Chatham National Bank desired and held this stock as collateral security for an indebtedness due it by the Farley Bank, we can perceive no injury to Henderson on that account. He received a quid pro quo from Woolfolk for the stock he surrendered. If he afterward ~~488~~ surrendered the bonds to Woolfolk, which he got in lieu of the stock, it is not shown that the Farley Bank, by any representation or by any act upon which he relied, induced him to do so. If Woolfolk got the better of him in the exchange of securities, no complaint is made of it in the pleadings or the evidence. Furthermore, as we have said, the bank is not shown to have induced him in any way to make the exchange, or to have derived title to the stock from him.

It is further argued in support of the proposition that the averments of the answer are proven by these facts, viz., that on March 23, 1891, Henderson sent to the Farley Bank a note of Woolfolk to him, in the sum of \$3,333.33, for collection, and on May 1st a similar note for \$4,000, for the same purpose, which were paid by checks drawn by Woolfolk on that bank, signed by him as "president." The evidence discloses that the consideration of these notes, which were ostensibly given, along with others, by Woolfolk and Saportas, was for the purchase of Henderson's stock in the corporation. However, there was nothing on their face indicating this. It is true the bank undertook their

collection, and that on presentation of them by it to Woolfolk he gave checks on it signed by him "president," which were paid by the bank and the amounts remitted to Henderson. Confessedly, all this does not, in the remotest degree, tend to prove that the stock was transferred to the bank, or that the bank transferred the stock to the complainants, as averred in the answer.

But it is said that the bank, by honoring these checks out of the deposits of the Alabama Terminal and Improvement Company, in payment of notes which showed on their face that they were the individual indebtedness of Woolfolk and Saportas, committed a wrong upon Henderson. This wrong consisted in not informing Henderson that Woolfolk was paying his debt to him out of the funds of the corporation and not his own. How did the bank know that Woolfolk was misappropriating trust funds? If it can be charged with such knowledge, it must be made to rest upon the fact that the checks were signed "Woolfolk, president"—a strange and anomalous position for Henderson to assume. He had, prior to this time, ⁴⁸⁹ received more than \$10,000 upon the sale of his stock, and every dollar of it was money belonging to the corporation. He had himself received checks signed in the same way, which he collected and appropriated; and he prosecutes this appeal, asserting as one of his grievances that the checks which he received did not carry notice to him that Woolfolk was using funds of the corporation. Had the bank notified him that it had declined to receive the checks from Woolfolk, it is evident he would have instructed it to do so. Or had the bank informed him that it had accepted the checks, it is very evident, judging from his conduct prior to that time and afterward, that he would not have repudiated the transaction. But the bank was under no such duty to him. It was simply under the duty to present the notes for payment, receive the money, and remit it to him. This it did. The deposits of the Alabama Terminal and Improvement Company with it was the money of the corporation, and not his. Whatever may have been its duty to that company with respect to paying these checks, it is a matter of no concern to Henderson. He is not asserting his claim in privity of right or interest through it. On the contrary, he is asserting that he received no money which belonged to the company—positively denying its title to the money received by him. Nor are the complainants' rights, under the aspect of the bill under consideration, dependent upon the right of the corporation to assert its title to this money. The transaction, as we have shown, was fraudulent as against these complainants. Being fraudulent, their rights to subject their

debtor's property fraudulently conveyed is in no wise dependent upon the right of their debtor to recover the money of Henderson.

Upon what principle an estoppel could be said to rest as to the money of the corporation received by Henderson, other than the two sums collected for him by the bank, so as to preclude the rights of these complainants, even if it be conceded that the bank owed Henderson the duty to notify him that Woolfolk had offered to pay these notes by checks drawn on the deposits with it, belonging to the corporation, we are unable to see. Certainly not upon the doctrine of ratification. The bank ⁴⁹⁰ is not shown to have had any knowledge that Henderson had made the sale of its stock to the corporation, nor is it shown inferentially or otherwise that it knew that Henderson had been paid more than \$10,000 of the corporation's funds by Woolfolk prior to March 23d, the date of the collection of the first note by it; and certainly its conduct with respect to receiving these checks had no influence upon Henderson by way of inducing him afterward to receive from Woolfolk money belonging to the corporation in payment of other notes maturing later. As to payments subsequently made to him, the doctrine of ratification certainly has no application. It is not asserted in the pleadings that as to the two items collected by the bank that there is an estoppel. The defense, if it can be said to be asserted at all in the answer, goes to the entire bill, and in bar of all the relief sought under it. Care, however, being taken not to confess the cause of action, as laid in the bill, but, on the contrary, to deny it, yet, in argument, it is insisted, notwithstanding Henderson's refusal to confess, that he should have the benefit of his avoidance of liability—a benefit entitled to be invoked only by those who are willing to and do confess and seek to avoid by proper averments in their pleadings. An estoppel in pais, in general, must be pleaded, and the facts supporting it must be clearly made out by the party relying upon it. Estoppels never arise from ambiguous facts, but must be established by such as are unequivocal, and not susceptible of two constructions. An estoppel must not rest in mere inference or argument, but must be a precise affirmation of that which makes it: 8 Ency. of Pl. & Pr. 10, and notes.

It follows from what we have said that Henderson takes nothing by his appeal.

Of the \$29,102.57 of the Alabama Terminal and Improvement Company's money received by Henderson, in payment for his stock, the learned judge in the court below only charged him, as

we have said, with \$8,719.61, and refused to charge him with the following items: \$2,500 paid February 24, 1891; \$7,530 paid on the same day; \$3,342.96 paid March 23d; \$4,010 paid May 1st; and \$3,000 paid June 6th, aggregating the sum of \$20,382.-96. From a reading of his ⁴⁹¹ opinion it is manifest that he regarded the sale of the stock as one to Woolfolk and Saportas, and not to the corporation, and that he gave little or no weight to the entries upon the books of the corporation introduced in evidence. His reason for his refusal to charge Henderson with these sums is put upon the ground that the evidence is insufficient to put Henderson on notice that these sums were moneys of the corporation. Was the sale of the stock by Henderson to Woolfolk and Saportas a bona fide one to them? Or was the taking of their notes a mere device to cover up a sale by him to the corporation? In solving these questions it will be well to bear in mind the relation of these parties to the corporation; the known opposition of Henderson and other Troy stockholders to the project of Woolfolk to construct the M. T. & M. Railroad out of the funds belonging to the Alabama Terminal and Improvement Company; the kiting operations indulged in by Woolfolk, as president of the Alabama Terminal and Improvement Company, by which that company was enabled to get credit from the Farley Bank for an enormous sum of money; the valuable aid rendered by Henderson to Woolfolk in consummating these kiting operations by accepting as treasurer hundreds of drafts drawn on him as such for large amounts, which were discounted by the Farley Bank, when he had not one dollar in his possession belonging to the company; notwithstanding Henderson's claim to have been only nominally performing the function of his office as treasurer of the corporation at a salary of \$900 per annum; the absolute want of any necessity for the drawing of these drafts in due course of business, as Woolfolk was clothed with full power to check upon any depository in which the corporation had funds, without Henderson's consent; the failure of Henderson to make known to the business world, and especially to the Farley Bank, whom he knew was discounting Woolfolk's drafts upon him, that he had no funds as treasurer, subject to draft, and that he was simply filling the office in a perfunctory way to accommodate Woolfolk. Also to bear in mind the further fact that Henderson accepted money in part payment of his alleged debt against Woolfolk and Saportas, known to him to be funds belonging to the corporation ⁴⁹² of which he was a director and its treasurer, whose duty as an officer required him to protect its assets against the spoliations of Woolfolk; and the

fact that Woolfolk and Saportas were insolvent, especially the former, who had been since the organization of the company its debtor in a large sum on account of stock subscriptions, which he never paid. But these facts are not all which legitimately tend strongly to show that the stock was sold by Henderson to the company, and not to Woolfolk and Saportas, and that he knew he was receiving money belonging to the company in payment of their alleged indebtedness to him. The most potent probative evidence tending to establish a sale by Henderson to the corporation and a knowledge by him that he was being paid out of its assets is to be found in the books of the corporation—entries upon the cash-book of the company. We repeat, the most potent probative evidence tending to establish these facts are to be found in these books, for the reason that if the facts disclosed by them stood alone, in connection with the admitted fact that Henderson was a director and treasurer of the corporation, at the time the entries were made, the facts as disclosed by those entries would have made at least a *prima facie* sale by him to the corporation of the stock, and of course notice to him that he was receiving assets of the company, his vendee, in payment for it.

The entries upon the cash-book disclose "Bills payable January 5, 1891: 3 notes account of A. C. Saportas and J. W. Woolfolk for the Alabama Terminal and Improvement Company, for \$10,000, each due as follows:

One note 30 days after date.....	\$10,000
One note 45 days after date.....	10,000
One note 60 days after date.....	10,000
	<hr/>
	\$30,000"

On credit side of cash-book:

"Investment account—

Bought of Fox Henderson 3,000 shares capital stock of
A. T. & I. Co.:

In suspense.....\$30,000"

⁴⁹³ A record of the renewal and extension notes executed by Woolfolk and Saportas, as well as all payments made by the corporation to Henderson, appear in the entries upon this cash-book. Henderson says to all this that he did not keep this book, and had no knowledge of its contents. It was presumptively his duty as treasurer to have kept this book, or to have some one to do so for him. He cannot, under the facts of this case, avoid, as against creditors of the corporation, the probative effect of

these entries by invoking his own dereliction of duty. Especially is this true, when taken in connection with the fact that he was accepting drafts drawn upon him as treasurer, known by him to have been discounted upon the faith of his acceptance of them, and that he had funds of the corporation with which to pay them. The doctrine is stated by Thompson on Corporations, section 5308, to be: "It is a sound view, at least in so far as the question respects the rights of third parties, that the directors of a corporation are in law conclusively presumed to know its condition, its business, its receipts and expenditures, and all the general facts which go to make up that condition and business, as shown by the entries on its regular books. The reason for this is that it is their duty to know these things in the exercise of their official functions. This doctrine is said to be one founded in public policy, essential to the safety of third parties in their dealings with corporations, and to the protection of the stockholders interested in the welfare and safe management of corporations."

Justice Brewer, now of the supreme court of the United States, while a member of the supreme court of Kansas, in the case of *First National Bank v. Drake*, 29 Kan. 326, 44 Am. Rep. 646, said: "The directory, as has been said, is the visible representative of the bank. Persons dealing with it meet only this visible representative, and have a right to presume that it knows all of the affairs of the bank, all that the bank as a principal ought to know of its condition and business. On the other hand, the stockholders and depositors—the persons who are pecuniarily interested in the safe management and prosperity of the bank—look to the directors as the chosen ⁴⁹⁴ guardians of their interests, and have a right to demand of them that they watch over all those interests in their minute details. So that all of these parties have a right to assume that the directors know all the transactions, business, and condition of the bank, because they ought to know them, and because otherwise they do not discharge their full duties to these various parties."

The case of *United Society v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731, was several actions of trover brought to recover of directors of an insolvent bank by those who had placed certain bonds in the custody of the bank, on naked bailment, as a special deposit. The declarations charged that the bonds so deposited had been converted to the use and emolument of the bank; that they had been abstracted from the package of special deposit by officers of the bank, and sold, and the proceeds used in the business of the bank; that the defendants, being directors, had notice

of the fact of such conversion, or could, by the most ordinary diligence, have had notice, as well from the ledgers, books, and accounts of the bank as from its correspondence, etc. To the declarations a demurrer was sustained by the lower court. The supreme court, reversing the rulings of the lower court, said: "Bank directors are not mere agents, like cashiers, tellers, and clerks. They are trustees for the stockholders; and as to their dealing with the bank, they not only act for it, and in its name, but, in a qualified sense, are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when anyone accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and if they fail in either, they violate a duty they owe not only to the stockholders, but to the creditors and patrons of the corporation: *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624, and note. . . . It is ⁴⁹⁵ further objection that the allegation of notice is so far qualified as to render insufficient the averment of its existence. It is stated that appellees 'and each of them, had, or could have had by the use of the most ordinary diligence and investigation, ample notice.' It is also alleged by Davenport that they each 'had notice as well from the ledgers, books, and accounts of said bank as from its correspondence, reconcilements, and statements.' It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties, they may, in controversies with persons transacting business with the bank, be presumed to have. They cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements, and statements of the bank, and which would have come to their knowledge except for their gross neglect or inattention. It is not necessary in many cases to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidences of the mismanagement of misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or willfully careless in the discharge of their duties. If it shall turn out upon the trial of

these actions that the ledgers, books, etc., of the bank showed that the special deposits of these appellants were being sold, and that this fact would have been discovered by appellees by the use of ordinary diligence, then the presumption of actual knowledge will arise. It follows, therefore, that the allegation of notice is sufficient."

These principles are also declared in *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. Rep. 428; *Merchants' Bank of Lincoln v. Rudolf*, 5 Neb. 527; *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Arlington v. Peirce*, 122 Mass. 270; *Bank of United States v. Dandridge*, 12 Wheat. 64.

The competency of the entries in the books as evidence against a director is recognized, though the presumption raised is not held to be conclusive or indisputable, ⁴⁹⁶ in *Merchants' Bank v. Taylor*, 21 Ga. 334; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; *First Nat. Bank v. Tisdale*, 84 N. Y. 655; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Bedford v. Sherman*, 68 Hun, 317, 22 N. Y. Supp. 892; *Spellier Electric Time Co. v. Geiger*, 147 Pa. St. 399, 23 Atl. 547; *Olney v. Chadsey*, 7 R. I. 224; *Lane v. Bank of West Tennessee*, 9 Heisk. 419.

Under the facts of this case, it is unnecessary to go to the length of holding the presumption raised against Henderson conclusive. According to these entries, the force of a disputable presumption of the truth of the facts stated in them, when taken and weighed in connection with the facts we have pointed out above, as shown outside of the book entries, our conclusion is that Henderson's statement, and that of Woolfolk's, that the stock was sold to Woolfolk and Saportas, and not to the corporation, is insufficient to overcome their probative effect. The sale being to the corporation, it follows as a matter of course that Henderson knew that he was being paid by it, his vendee.

A decree will be here entered affirming the decree upon the appeal prosecuted by Henderson, and reversing the decree upon the appeal of Hall and Farley. A decree will also be here rendered in favor of Hall and Farley, as trustees, for all the money paid to Henderson on account of this sale.

The Purchase of Its Own Stock by a Corporation is necessarily a reduction of its capital, condemned by the plainest dictates of sound policy: *Adams etc. Co. v. Deyette*, 8 S. Dak. 119, 59 Am. St. Rep. 751, 65 N. W. 471. It is against public policy and ultra vires, whenever it lessens the corporation's ability to pay its debts or lessens the security of its creditors: *Adams etc. Co. v. Deyette*, 8 S. Dak. 418, 49 Am. St. Rep. 887, 59 N. W. 214. While perhaps a solvent corporation may invest its funds in the purchase of its own stock, yet, if for any reason the purchase is to the prejudice

of the creditors of the corporation, as where the concern is in an insolvent condition, or is about to dissolve and wind up its affairs, the purchase will be declared illegal and voidable at the instance of such creditors: See the monographic note to *Commercial Nat. Bank v. Burch*, 83 Am. St. Rep. 839, 843.

Corporation—Duty of Officers.—That which directors ought, by proper diligence, to have known as to the general business of the corporation, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business: *Hanover Nat. Bank v. American Dock etc. Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72.

An Estoppel in Pais must be specially pleaded to be available: *Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49, 60 Pac. 354; *State v. East Fifth St. Ry. Co.*, 140 Mo. 539, 62 Am. St. Rep. 742, 41 S. W. 955. See, further, the extended note to *Tyler v. Hall*, 27 Am. St. Rep. 344. Estoppels must be pleaded with great particularity and precision, leaving nothing to intendment: Note to *Tyler v. Hall*, 27 Am. St. Rep. 347.

A Collateral Attack on a Judgment cannot be successful unless it is void: *Dyer v. Leach*, 91 Cal. 191, 25 Am. St. Rep. 171, 27 Pac. 598; *Kingman v. Paulson*, 126 Ind. 507, 22 Am. St. Rep. 611, 28 N. E. 393. Merely erroneous or voidable judgments are not subject to collateral attack: *Edmundson v. Independent School Dist.*, 98 Iowa, 639, 60 Am. St. Rep. 224, 67 N. W. 671; *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, and cross-reference note thereto, 54 Pac. 359.

SHEPPARD v. DOWLING.

[127 Ala. 1, 28 South. 791.]

CONSTITUTIONAL LAW—TITLE OF STATUTE.—An act entitled "To authorize municipal and other subdivisions of the state to buy and sell spirituous, vinous, and malt liquors, and to further regulate or prohibit the sale of such liquors," embraces but one subject—namely, the exclusive sale of liquors by municipalities. (p. 70.)

LEGISLATURE—SOURCE OF POWER OF.—The constitution is not the source of the powers of a state legislature, but only limitations thereon, and apart from such limitations the power of the legislature has no bounds. (p. 70.)

DISPENSARY ACT—CONSTITUTIONAL LAW—REGULATING INTERSTATE COMMERCE.—An act prohibiting the sale of liquors in certain counties by all persons except dispensers, but providing that manufacturers may sell to anyone who is authorized to deal in liquors, is not unconstitutional as being an attempt to regulate interstate commerce, since the act has no reference to sales made outside of such designated counties. (pp. 70, 71.)

CONSTITUTIONAL LAW—CONFERRING POWERS ON MUNICIPALITIES—CHARTERS.—The legislature may confer ad-

ditional powers on municipalities by original acts which contain no reference to existing municipal charters. (p. 71.)

CONSTITUTIONAL LAW—CREATING OR RENEWING CHARTER—MUNICIPAL CORPORATIONS.—An act conferring upon municipal corporations the power to deal in liquors does not create, renew, or extend their corporate charters within the meaning of a constitutional provision prohibiting such a law. (p. 73.)

CONSTITUTIONAL LAW—EXTENDING CHARTER.—A constitutional provision prohibiting the extension of the charter of more than one corporation has reference solely to time, and not at all to additional powers. (p. 73.)

CONSTITUTIONAL LAW—MUNICIPALITIES—CREATING, RENEWING AND EXTENDING CHARTER.—A constitutional provision prohibiting laws which shall create, renew, or extend the charter of more than one corporation has no application to municipalities, but only to private corporations. (p. 73.)

CONSTITUTIONAL LAW—CORPORATE POWERS—MUNICIPALITIES.—A constitutional provision prohibiting corporations from engaging in any business not expressly authorized by their charters applies solely to private corporations. (p. 73.)

CONSTITUTIONAL LAW—POWERS CONFERRED BY CHARTER.—A power conferred upon a corporation by an independent act is a power conferred by its charter. (p. 73.)

DISPENSARY LAW—CONSTITUTIONALITY—REVENUE ACT.—An act to provide for the dispensing of liquors by municipalities under limitations, the municipalities to pay the regular license tax, is a police regulation, and not an act for raising revenue, and hence need not originate in the House of Representatives. (p. 73.)

DISPENSARY LAW—GOVERNMENT ENGAGING IN PRIVATE BUSINESS—POLICE POWER.—Under its police power, the state may regulate the liquor traffic by placing it in the hands of disinterested men, and authorizing municipalities to engage in its sale is a mere necessary incident to the exercise of this power, and is not the government engaging in private business within the prohibition of the constitution. (p. 74.)

DISPENSARY ACT—CONSTITUTIONAL LAW—MUNICIPALITIES.—Under the constitution of Alabama the legislature may authorize towns and counties to carry on the liquor traffic as an incident to the regulation of that traffic. (p. 74.)

DISPENSARY LAW—CONSTITUTIONALITY—PURSUIT OF HAPPINESS.—To prohibit the sale of intoxicating liquors by all individuals, and committing the traffic exclusively to towns and counties, does not violate the inalienable right of the citizen to the pursuit of happiness, and is not class legislation. (p. 75.)

DISPENSARY LAW—REPEAL OF OTHER LAWS.—The provision of a dispensary act that it does not repeal any law that tends to prohibit, retard, restrain or restrict the traffic in intoxicating drinks, does not refer to general or special laws regulating the method of obtaining licenses to sell liquor, and such laws are repealed. (p. 76.)

Sollie & Kirkland, for the appellant.

A. T. Borders, contra.

• **McCLELLAN, C. J.** On this appeal are presented for consideration the constitutionality and the construction and operation of the act of February 18, 1899 (Acts 1898-99, p. 108), commonly known as "The Dispensary Law." The title of the act is this: "To authorize municipal and other subdivisions of the state to buy and sell spirituous, vinous, and malt liquors, and to further regulate or prohibit the sale of such liquors." In the body of the act provision is made for the carrying on of the business of selling such liquors by towns, cities, and counties, and the sale of liquors in the territory to which the act applies by others than the towns, cities, and counties is prohibited under severe penalties; and the act prescribes minute regulations of the sale by such municipal bodies. It is insisted for appellant that the title of the act embraces, and that its body provides for, two subject matters, viz., the sale of liquors by municipalities and the prohibition of its sale, in violation of section 2 of article 4 of the constitution. This is hypercriticism. The act has but one subject; its purpose is single. It is simply to provide for the exclusive sale of liquors by municipalities. To do this it was necessary to empower them to engage in the business and to prohibit others to engage in it. That is all that is expressed in its title, and that is clearly expressed therein; and that is all that is provided for in the body of the act. What else is therein prescribed and provided is mere detail necessary to the carrying on of the business the municipalities are authorized to engage in. Of course, a town empowered to establish and conduct a dispensary of liquors must needs have a dispenser, and the provisions of the act for the appointment and prescribing the duties of dispensers are obviously cognate to, and complementary of, the subject expressed in the title; necessary to carrying out the purpose of the act, and hence covered by the expression of that purpose in the title. And we know of no constitutional guaranty, or fundamental principle of government, or chart of liberty or [•] inalienable right that would be violated by the selection of a dispenser for a town, who chanced to live beyond its corporate limits. Not only so, but as the dispensary, though carried on by a town, is for the country or county as well as the town, it would seem to be entirely appropriate for the county authorities to have the voice which is given them by the act in the selection of dispensers.

Much is said in argument for appellant to the general effect that though the establishment of dispensaries for the exclusive sale of liquors, as proposed by this act, may not be violative of the letter or spirit of any ordinance of the state or federal con-

stitutions, yet that those organic governmental charters "do not contain all the constitutional liberties and guaranties of the people, and that we have a vast reserve of such liberty not found in any written constitution, and which by the very nature of the case could not be put into any written constitution"; and that this act trenches upon this reserve of unexpounded and unformulated rights which the legislature, though not inhibited therefrom by the organic law, is without power to interfere with. It will suffice in reply to all this to say that this court is thoroughly committed to the doctrine that the constitution of the state, and the constitution of the United States, so far as it has any application, are not the sources of the legislative power, residing in the general assembly of Alabama, nor in any sense grants of power to the legislature, but only limitations upon that power, and that, apart from the limitations imposed by those fundamental charts of government, the power of the legislature has no bounds and is as plenary as that of the British parliament. All which the general assembly is not forbidden to do by the organic law, state or federal, it has full competency to do. And if there be any plausible objection to the soundness of this doctrine in any connection, it is surely unassailable in its application to the power of the legislature to regulate the liquor traffic.

Another objection to this act stated by counsel for appellant, but not urged in argument, is that, as a whole, it is violative of the interstate commerce clause of the constitution of the United States. As counsel do not ⁷ deem this position worthy of discussion, we content ourselves with saying that it is without merit.

But counsel do insist in argument that the saving clause in section 10 of the act with respect to brewers and distillers is violative of the constitution of the United States. That section, so far as necessary to be here set out, is as follows: "No spirituous, vinous, or malt liquors, or intoxicating drinks, shall be sold in any county of this state in which a dispensary is authorized to be located, except as herein provided. But nothing in this act shall be so construed as to prevent any person who manufactures spirituous, vinous, or malt liquors, in a brewery, or distillery, from selling the same by wholesale, in sealed packages, to dispensers, or to liquor dealers, who may be otherwise authorized to sell such liquors." It is contended that the effect of these provisions is to limit the right to sell liquors to dispensers and other authorized dealers to brewers and distillers, and to prohibit such sales by other persons wherever they may reside and carry on business, whether within the dispensary district or without the district in the state, or beyond the state, and that

It is insisted that this act provides for the carrying on of business of a private nature by counties and ¹⁰ towns, that these municipalities are mere political subdivisions of the state for governmental purposes, that such business carried on directly by them is indirectly, but none the less essentially, a private enterprise, in which the state is interested, and that, of consequence, the act is violative of section 54 of the fourth article of the constitution which ordains, inter alia, that the state shall not "be interested in any private or corporate enterprise." There is authority for this answer to the position thus taken for appellant: That the purpose, object, and effect of the act is regulative of the liquor traffic by putting it in the immediate control of men who have no personal interest to be subserved by increasing the volume of business, or by selling liquors of an inferior and deleterious quality, etc., that under the police power the state has the undoubted right to provide such regulations, and that the pecuniary interest which the state is supposed to have in the business through its subdivisions is a mere necessary incident to the exercise of this undoubted power, and hence that the business so carried on is a public governmental concern, and not a private enterprise within the purview of the organic provision in question: *State v. Aiken*, 42 S. C. 222, 20 S. E. 221. But we place our decision of the point upon other considerations: The framers of the constitution of Alabama were careful to differentiate the state from municipal subdivisions, towns, cities, and counties, in respect of what is forbidden to be done by the state, considered as a separate entity, on the one hand, and what the general assembly is inhibited to authorize such subdivisions to do on the other; and they embodied in the instrument two distinct provisions having reference severally to the state and its said municipalities, containing, respectively, the one, all the limitations intended to be ordained in this connection upon the powers of the state as such, and, the other, all the limitations intended to be put upon the power of the legislature in respect to authorizing action by counties and towns. This is the ordinance as to the state (Const., art. 4, sec. 54): "The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such; nor shall the state be interested in any private or corporate enterprise, ¹¹ or lend money or its credit to any individual, association, or corporation." And this as to the towns and counties (Const., sec. 55): "The general assembly shall have no power to authorize any county, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value, in aid of or to any individual, association, or corpora-

tion, whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise." There is a notable absence from this last ordinance of any inhibition upon the legislature to authorize towns and counties to engage or be interested in private enterprises; and the intent of the members of the constitutional convention to leave the general assembly a free hand in this connection is emphasized and made to stand out in bolder relief by the inclusion of such a provision in the immediately preceding section having reference solely to the state as an entity distinct from such subdivisions. And this intent is further borne out and sustained by reference to the history of the times just preceding the framing of this constitution, and to the conditions then existing, from which it is clearly deducible that enterprises of the nature provided for in the act under consideration were not among the evils which the convention had in mind and purposed to provide against by this ordinance, limiting legislative power in respect of authorizations to towns and counties: *Garland v. Board of Revenue*, 87 Ala. 223, 6 South. 402. Hence, our conclusion that it was entirely competent for the general assembly to authorize towns and counties to carry on the liquor traffic as an incident to the regulation of that traffic provided for by this act.

Pursuit of happiness is one of the citizen's inalienable rights. But the lines of such pursuit are not unlimited. A man's chief joy may be in the death of his enemy, yet the law does not allow him to pursue happiness in that direction. So his individual sense of bliss attained may result from carrying on the liquor traffic; but the law does not esteem that particular avocation, involving, as it does in the eye of the law, baneful consequences to society, so necessary to his happiness as that his right to pursue happiness along that line is guaranteed to him by the Declaration of Rights; and efforts toward the attainment of content may, without violence to organic ¹² guaranties, be confined entirely to other channels, or, if allowed to be exerted in this, be clogged and impeded by such regulations as the legislature may deem necessary or conducive to the public good. And the general assembly having the right to prohibit entirely the sale of intoxicating liquor, may prohibit its sale by all individuals and private corporations, and commit the traffic exclusively as a mode of regulation to counties and towns, without violating any inalienable or other right of the individual, and without impinging upon the rule against class and unequal legislation.

Section 13 of the act is as follows: "This act shall not be construed to repeal any law, local or general, that tends to prohibit, retard, restrain, or restrict the traffic in spirituous, vinous, or malt liquors, or intoxicating drinks of any kind." And section 15 provides that "all laws and parts of laws that conflict with the provisions of this act, except those referred to in the thirteenth section of this act, are hereby repealed." It is contended that under these provisions this act cannot apply to the town of Pinckard, in which appellant proposes to engage in the liquor traffic, because at the time of the passage of this act there was a local law in force in and upon said town which "tended to prohibit, retard, restrain, or restrict the traffic in spirituous, vinous, or malt liquors," and which was not repealed by this act. The local law referred to did not prohibit the sale of liquors in Pinckard; but it provided that before license should be issued to engage in the liquor business there the applicant therefor should file in the office of the judge of probate "a written recommendation of a majority of the legal electors and a majority of the bona fide householders who have resided in the corporate limits of said town of Pinckard twelve months next preceding such application, stating that they are acquainted with the person or persons to whom such license is to be issued, that such person or persons are possessed of good moral character, and in all respects are proper and suitable persons to be licensed to sell malt or spirituous liquors, or other intoxicating drinks, within the corporate limits of said town." If this local act "tends to prohibit, retard, restrain, or restrict" the liquor traffic within the meaning ¹³ of section 13 of the dispensary act, in the same way the general law, which imposes heavy taxes upon liquor dealers, and requires that before a license to retail shall be granted the applicant must produce to the judge of probate "a recommendation in writing, signed by twenty respectable householders and freeholders residing within the corporate limits of the town, city or precinct, in which he proposes to engage in the business of retailing, stating that they are acquainted with him, that he is of good moral character, and is in all respects a proper person to be licensed," and providing further that "if there be not within the precinct twenty resident householders and freeholders, the recommendation must be signed by a majority of the householders and freeholders residing therein," tends to prohibit, retard, restrain, or restrict such traffic. The difference between the local statute applying to Pinckard and this general law in the respect under consideration is obviously a difference of degree merely and not of kind; and if the local law is saved from repeal by section 13 of the statute involved in this case,

so also is the general law. And if this be true, it is manifest at once that the statute is left without any field of operation and is utterly emasculated. These considerations lead us to the conclusion—since, of course, it was the legislative intent to give the act some potency and operation, since it is our plain duty to find some field for its operation, and since effect may be given to section 13 short of holding the law-making power to have stultified itself—that it was not the legislative purpose to save either the general law applicable to the whole state or the special law obtaining in the town of Pinckard, each having reference, it is to be noted, only to the certification of the fitness of the applicant for license to engage in the liquor business, from the general repealing clause embodied in section 15 of this act, or to provide that this act should not apply to localities in which theretofore licenses to engage in this business were issuable upon a certain prescribed recommendation of the applicant's moral character and fitness to carry it on. Whether this dispensary law is a wise and judicious exercise of the legislative power is no concern of the courts, and we have neither the right nor the inclination to so construe its several provisions as that they will be ¹⁴ destructive of each other and of the statute as a whole; but discharging the duty which is upon us to so construe what the general assembly has written down as to give effect to all they have said, we hold that whatever may be the effect of section 13 of the act, it has no operation in respect of such special laws as that which formerly obtained in the town of Pinckard, nor in respect of the general provisions embodied in section 3520 of the code.

We have considered all the points urged in argument against the validity of the statute in question and against its application to the town of Pinckard; and we concur in the judgment of the circuit court that the act is constitutional and valid, and that it is of force in respect of the liquor traffic in the town of Pinckard, and the judgment of that court must be affirmed.

Title to Statutes.—On the sufficiency of the titles to statutes regulating the sale of intoxicating liquors, see the monographic notes to *Crookston v. County Commrs.*, 79 Am. St. Rep. 471, 472; *Bobel v. People*, 64 Am. St. Rep. 98-102.

Liquors.—How far a state may regulate or prohibit the sale of intoxicating liquors is considered in the monographic notes to *Commonwealth v. Kimball*, 35 Am. Dec. 331-339; *Booth v. People*, 78 Am. St. Rep. 253-255.

Dispensary System.—The controlling features of the dispensary system of selling liquors are: 1. That no liquors shall be sold by the drink, and none shall be drunk on the premises where sold; 2. That the management and control of the sale of liquors under such a system must be in the hands of a person not pecuniarily

that company, had the right to engage in the business of making and vending mattresses in the same city, and, so far as the manufacture was not protected by patents, of the same kind and quality as those made by the appellee. It is under this right, the appellants seek to justify their conduct: *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446. But they cannot make this principle cover this case. The appellants themselves, first, and the appellee afterward, built up, it must be presumed, at the cost of time, trouble, and expense, the reputation of a mattress of a particular type, as to quality, form, style, and dress, under the name and label of "Perfection Mattress." The appellants first, in the sale to the partnership and afterward to the corporation, and still later, in the sale of the stock in the corporation, are presumed to have received a full consideration for the transfer to the appellee of the exclusive right to this goodwill and trademark. Certainly, to deceive the public and take the hard-earned patronage which an artisan or dealer has attached to a particular brand employed to designate the origin and quality of his goods, is a double wrong, in that it is a deception of the public and an injury to the individual. In this case it is insisted that the word "perfection," in the connection in which it was used, is not, and cannot be, a trademark. The law on this subject is clearly stated in the case of *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396. It is there shown "that 'the office of a trademark is to point out distinctly the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known, but not previously applied to the same article. . . . Hence the trademark must either by itself or by association point distinctly to the origin or ownership of the article to which it is applied. The reason for this is that unless it does, neither can ⁴⁹ he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived.'" Without quoting more, let us apply this to the facts of this case. What does "perfection mattress" mean? Grammatically, it is nonsense, unless we regard "perfection" as a fanciful name to mark the peculiar goods of some person; in this case, of the "Perfection Mattress Company." The word has the same significance in each of these collocations. In the latter phrase, though a general word of the language, it is applied and appropriated to designate a corporation in connection with the words "mattress company." In this connection, it would be useless to look in a dictionary for its meaning. In the former phrase,

it likewise was a fanciful name given to the goods manufactured by the Kyles, and afterward by the copartnership and the corporation. It was clearly so intended, because it could have no other meaning, and by the law of association it has now become an established designation with the public of the product of the appellee: *Waterman v. Shipman*, 130 N. Y. 301, 29 N. E. 111; *O'Rourke v. Central City Soap Co.*, 26 Fed. 576; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286; *Royal Baking-Powder Co. v. Raymond*, 70 Fed. 376; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. Rep. 143; *Bennett v. McKinley*, 65 Fed. 505.

By the production of a superior article answering to this original fanciful name, the word may acquire a new meaning indicative of quality. But this is the natural and desired result of a trademark, making it more valuable, and it would be strange that this should make it common property: *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396.

It is reasonably certain that the appellants well understood the value of the name "perfection" as a mere name, in its use in connection with the mattress, as indicating a product which had been manufactured by them originally and afterward and now by their vendees and successors in business, and which had come to indicate a mattress of high esteem and reputation. If it was used awkwardly and ungrammatically in the first instance to express a grade or quality, how was it that they fell into the same error in reference to their product? It cannot be seriously doubted from ⁵⁰ the facts that the appellants intended by adopting the name to delude the public and to secure the patronage which appertained to its use in the particular connection belonging to the appellee. What other purpose could the appellants have had in using this substantive noun "perfection" as an adjective? The motive is disclosed in the care taken to give their mattresses the peculiar dress of the appellee's, and in the similarity of their label in other respects than in the adoption of the name "perfection" to that of the appellee, and in the false recitals of their former connection with the appellee. All these things point to the formed design of imitation in aid of the adopted name: *McLean v. Fleming*, 96 U. S. 245; *Colgate v. Adams*, 88 Fed. 899; *Partridge v. Menck*, 47 Am. Dec. 296; *Hutchinson v. Blumberg*, 51 Fed. 829; *Carroll v. Ertheiler*, 1 Fed. 688; *Humphreys v. Wenz*, 14 Fed. 250.

It may be said, however, that a careful observer would not be deceived by the label. That it expressly gives notice that the Kyle Mattress Company was the manufacturer. But why use

"perfection" at all as a name? Was there any necessity arising from the paucity of language which required the use of this name? Or, if the word described the quality, why make the same grammatical blunder as that made in describing the mattresses manufactured by the appellee? Copying mistakes dispels all claims to originality. The differentiation from appellee's label found in appellants' was evidently put in to found an argument on, in case of suit, while the similitude was inserted to obtain the public patronage by deception. "This is the usual artifice of the unfair trader": *Collinsplatt v. Finlayson*, 88 Fed. 693. The case of *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446, contains a number of cases illustrative of this. It is there said: "No man has a right to sell or advertise his own business or goods as those of another person." It is also further said: "That an assignment of all of the stock, property, and effects of a business . . . carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trademarks and trade names as have been used in such business." The authorities cited in this ⁵¹ case, as well as many in the briefs of counsel, bring the case under consideration within the influence of these principles.

In *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545, the opinion delivered by Judge Cooley, it was held that parties doing business under the name of Kalamazoo Wagon Company, having sold out, could not carry on a rival business under the name of the Kalamazoo Buggy Company. Says he: "The goodwill was a substantial part of the purchase, and purposely to take any steps to prevent his [the vendee's] receiving the benefit of it was a wrong of the same nature as would have been the retention of some portion of tangible property." Here, then, is a right to the exclusive use of the term "perfection mattress," both as a trademark and under the sale of the goodwill of the Perfection Mattress Company.

In *Lee v. Haley*, L. R. 5 Ch. App. 155, the defendant, who had been manager of a firm doing business under the artificial name of "Guinea Coal Company," set up a rival business at a different stand under the name of "Pall Mall Guinea Coal Company." His envelopes and business cards resemble the plaintiffs'. He was held a cheat.

In *Glenny v. Smith*, 2 Drew & S. 476, defendant, who had been employed by plaintiffs, printed his sign and arranged his awnings so as palpably to attract the public, on the idea that they were trading with plaintiffs. He used his own name,

"from" in small letters, "Thresher and Glenney," plaintiffs' firm name, in large letters. He had an awning, which when let down would cover his name and expose only the plaintiffs' firm name. The court held that defendant was deceiving the public.

The purpose to appropriate what belongs to others is not veiled by calling the new mattress "Kyle's Perfection Mattress," or by asserting that it was the "Improved Perfection Mattress," or other weak differentiations. When there is a marked similarity in the labels, signs, literature, and devices for attracting custom, but little weight is attached to precautionary differences or denials of a purpose to deceive the public: *Collinsplatt v. Finlayson*, 88 Fed. 693.

⁵² We are constrained to hold that the lower court committed no error in refusing to dismiss the bill for want of equity or to dissolve the injunction.

Affirmed.

WHAT WORDS OR PHRASES MAY CONSTITUTE A VALID TRADEMARK.*

I. General Principles.

- a. Use of Trademarks.
- b. Must Express Origin and Ownership.
- c. Truthfulness.
- d. Novelty and Utility.

II. What are and What are not Valid Trademarks.

- a. Arbitrary and Fanciful Names.
- b. Descriptive Words.
 1. Descriptive of Character, Quality, or Grade.
 2. Generic Terms.
 3. Descriptive of Use or Purpose.
 4. Describing Ingredients or Composition.
 5. Descriptive Meaning an Acquired One.
- c. When Words not Sufficiently Descriptive.
- d. Suggestive Words.
- e. Proper and Personal Names.
 1. Name of Inventor, Maker, or Proprietor.
 2. Different Persons of Same Name.
 3. Corporate Names.
 4. Personal Fictitious Names.
- f. Geographical Names.
 1. In General.
 2. Mineral Waters.

***REFERENCES TO MONOGRAPHIC NOTES.**

Assignment of trademarks: 17 Am. St. Rep. 496-499.
Trademarks, what constitutes, and infringement of: 47 Am. Dec. 284-299.
Various questions relating to trademarks have been treated in 12 Am. Rep. 419-444, 25 Am. Rep. 191-196, 33 Am. Rep. 335-339, and 35 Am. Rep. 546-550.

- g. Name of Material, or Article or Words in Common Use.**
- h. Names of Publications.**
- i. Trade Signs.**
- j. Patents and Copyrights.**
- k. Letters.**
- l. Numerals.**
- m. Colors.**
- n. Form of Article or Package.**
- o. Devices and Symbols.**

I. General Principles.

a. Use of Trademarks.—There are really two rights involved in the adoption and use of trademarks. One is the exclusive right to use a particular mark or sign or words, and to be protected in that use from competition with others who may attempt to use it; and second, the right to protection from unfair competition and to protect the public from imposition and deception. The first cannot exist without the second, but the second may exist alone. Thus, a person may not have the exclusive right to use a particular sign or form of words, because the words may not be the subject of a valid trademark. And yet, having used such words or sign, and the goods being known to the public under such marks as his goods, another cannot so use the sign as to represent to the public that he is the original and only maker of the article. Obviously, this would be an imposition and fraud upon the public, and such unfair competition as should be prevented. This double right involved in the use of a trademark has been frequently recognized, and the courts have protected one from unfair competition, and the public from deception, while refusing to recognize the exclusive right to use a particular form of words as a trademark: See *Shaw Stocking Co. v. Mack*, 12 Fed. 707; *Pierce v. Guitard*, 68 Cal. 68, 58 Am. Rep. 1, 8 Pac. 645; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002; *Centaur Co. v. Killenberger*, 87 Fed. 725; *Frost v. Rindskoff*, 42 Fed. 408; *La Republique Francaise v. Schultz*, 94 Fed. 500; *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. Rep. 270. In *Pierce v. Guitard*, 68 Cal. 68, 58 Am. Rep. 1, 8 Pac. 645, a large business was built up under the name of "German Sweet Chocolate," and the court, while declining to decide that the manufacturer had an exclusive right to use these words as a trademark, or whether they could constitute a trademark or not, yet held that another person could not use the same name even with slight variations, as "Sweet German Chocolate," in such a way as to induce the public to deal with him in the belief that they were dealing with the person who had given a reputation to the name. The same rule was announced in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002, where upon the ex-

piration of the Singer sewing-machine patent, the defendants manufactured sewing-machines under that name. The court held that while the generic name "Singer" passed to the public upon the expiration of the patent, together with the right to make the machine itself, yet a new manufacturer may be compelled to indicate that the sewing-machines made by him are made by him, and not by the proprietors of the extinct patent, and this to protect the public from deception and prevent unfair competition. This case was followed in *Centaur Co. v. Killenberger*, 87 Fed. 725, where the right to manufacture Castoria according to Pitcher's patented formula, and to sell the article as such, was free to all the world, after the patent had expired, but the court held that in putting the medicine upon the market, the new manufacturer must clearly identify his goods. No one has a right to represent that his goods are manufactured by another: *Frost v. Rindskoff*, 42 Fed. 408. But there must be real deception in order to constitute a right to protection: *La Republique Francaise v. Saratoga Vichy S. Co.*, 99 Fed. 733. In *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. Rep. 270, the supreme court held that where the geographical word "Elgin" had acquired a secondary signification in connection with its use, the courts would afford protection from imposition and fraud, although the name was not technically a trademark, and was not susceptible of registration as a trademark under the act of Congress. This distinction between the exclusive right to use a word as a trademark, and the right of protection from fair competition and the right to guard the public from deception, will recur repeatedly in this note in connection with the right to use particular forms of words as a trademark.

b. **Must Express Origin and Ownership.**—*Browne on Trademarks*, section 143, points out the characteristics of a valid trademark as: "1. Invariability—i. e., fixed, positive, unmistakable; 2. Individuality; such a difference from other symbols as to indicate origin and ownership; 3. Universality, of a right to its use; good as a representative of, or substitute for, the owner's signature all the world over; 4. Exclusiveness of the right to use; 5. Application to merchandise; 6. Use in lawful business; 7. Truth and good faith; 8. Duration unlimited, but by the trade itself (protection, however, may sooner cease)." For the purposes of this note we need simply to call attention to these characteristics without much extended notice of them. As to the fifth, "application to merchandise," we shall subsequently see that the principle of trademarks has been applied to trade signs, corporate names, publications, and other things, so that while they may not under some definitions be technical trademarks, yet being accorded the protection given to trademarks, they are such for all practical purposes. The chief characteristic of a trademark is that it should indicate the origin or ownership of the article. For, unless a trademark does

this, the one who first used it cannot be injured by its appropriation or imitation by others, neither can the public be deceived. The trademark may either by itself, or by association, point to the origin or ownership of the article to which it is applied: See *Canal Co. v. Clark*, 13 Wall. 311; *Falkinburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396; *Thomas G. Plant Co. v. May Co.*, 105 Fed. 375; *Tetlow v. Tappan*, 85 Fed. 774. The main object of a trademark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. This is the only useful purpose which a trademark can or is intended to serve: *Handy v. Commander*, 49 La. Ann. 1119, 22 South. 230; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396. The exclusive right to use a trademark does not rest on invention, but on such use as makes it point out the origin of the claimant's goods: *Tetlow v. Tappan*, 85 Fed. 774. Where the general and chief purpose of a trademark is to point out the origin or ownership of articles, the right to be protected in the exclusive use of such trademark is not affected by the fact that the words used also denote quality, and carry with them a claim of excellence incident to the goods: *Thomas G. Plant Co. v. May Co.*, 105 Fed. 375. In *Oakes v. St. Louis Candy Co.*, 146 Mo. 391, 48 S. W. 467, the words "What Is It," as applied to a particular candy, were denied protection as a trademark on the ground that they did not point out its origin or ownership.

a. **Truthfulness.**—Generally speaking, a trademark should express the truth, and should be adopted and used in good faith. If its purpose or effect is to practice a fraud on the public, and to deceive them so that they will buy goods which are not what they are represented to be, a trademark will not be protected. Thus, where soap was sold as "Old Country Soap," for the purpose of inducing residents from Europe to believe that such soap was made in the "old country," a person is not entitled to protection in the use of such name: *Wrisley Co. v. Iowa Soap Co.*, 104 Fed. 548. And a manufacturer of Havana cigars who advertised as using only the choicest grades of Havana tobacco, when in fact he used inferior grades, and in many cigars no Havana tobacco at all, was denied protection on the ground of misrepresentation: *Hilson Co. v. Foster*, 80 Fed. 896. A similar holding respecting the advertising and sale of whisky is found in *Krauss v. Peebles' Sons Co.*, 58 Fed. 585. One who falsely represents the composition of his goods is in no position to enjoin a rival manufacturer from using similar labels on the ground that the latter deceives the public: *Clotworthy v. Schepp*, 42 Fed. 62. Equity recognizes no property right in a trademark which is calculated to deceive the public as to the place where goods are manufactured. Hence, where shoes are manufac-

tured in Georgia, a trademark "Old Colony Shoe Company, Rockland, Mass.," under which the goods are sold, which trademark was adopted because of the reputation of Rockland as a place where fine shoes were made, is not entitled to protection: *Coleman etc. Co. v. Dannenberg Co.*, 103 Ga. 784, 68 Am. St. Rep. 143, 30 S. E. 639. And a trademark which states that the article is made in London by a firm who are purveyors to her majesty, when in truth is prepared in New York by a different firm, will not be protected: *Raymond v. Royal Baking Powder Co.*, 85 Fed. 231. A trademark on medicine which states that it was made in Massachusetts by one firm will not be protected, where the medicine is in fact made in New York by another firm: *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. Rep. 436. A trademark, "Prince's Metallic Paint," originally used to designate paint made from ores dug from the Prince mine, is not entitled to protection when used in connection with paints made from ores coming from other mines: *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, 57 Fed. 938.

It is not every untruthful or inaccurate statement, however, that will deprive a person of the right to the exclusive use of a trademark. Thus, the mere fact that a medicine will not accomplish all that is claimed for it is not sufficient fraud to deprive a company of relief in a court of equity: *California Fig Syrup Co. v. Worden*, 95 Fed. 132. Inaccurate statements which are immaterial are not such false representations as to disentitle a manufacturer using labels to protection against infringement: *Tarrant & Co. v. Hoff*, 76 Fed. 959. The fact that the same trademark is put on different brands is immaterial, where the different brands are properly distinguished so that no deception results: *Lichtenstein v. Goldsmith*, 87 Fed. 359. Where the boxes sold are also labeled with the name of the local dealer is not such a false representation as will invalidate the trademark: *Lichtenstein v. Goldsmith*, 87 Fed. 359; *Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. 896. The continued use of the name of a firm as a trademark, after a change has taken place in the name of the firm, is not such a deception as will deprive the firm of the right to protection in the use of the name: *Feder v. Benkert*, 70 Fed. 613. The fact that "Carlsbad Sprudel Lozenges" contain but ten per cent of the ingredients found in Carlsbad water is not such a misrepresentation as to prevent the court from giving relief for an infringement of the name: *Carlsbad v. Kutnow*, 71 Fed. 167. Where a complainant, who seeks to have his trademark protected, corrects false statements therein and in his advertisement after suit is brought, this does not help his case if he had no right to protection at the time the suit was filed: *Alaska Packers' Assn. v. Alaska Imp. Co.*, 60 Fed. 103.

From an examination of the cases already cited it will appear that there is a distinction between false statements made by a complain-

ant who is seeking to have his trademark protected, and false statements made by one against whom relief is sought. In the first case, the false statements of the complainant will prevent him from obtaining relief and he is not entitled to the exclusive use of his trademark, since he does not come into equity with clean hands. In the second case, the complainant is not entitled to relief merely because of the false statements of the defendant, and the defendant will not be enjoined from using his words or designs merely because they are false, unless the complainant also has the exclusive right to their use. In other words, untruthfulness and false statements furnish good ground for denying relief and protection, but they are not always sufficient cause for granting affirmative relief unless the complainant has the exclusive right to use the trademark.

d. Novelty and Utility.—The word or words employed should be new or novel in their application to the particular article, and not a word generally used in connection with such article. Thus, the words "Tycoon Tea," which had been in general use for many years as a term descriptive of a particular class of teas, are not the subject of a trademark, since all men engaged in the tea business had an equal right to use them. The words belonged to the public as the common property of the trade: *Corbin v. Gould*, 133 U. S. 308, 10 Sup. Ct. Rep. 312. "La Normandi," as applied to cigars, is not sufficiently novel to be a trademark where it has long been in use for this purpose by others: *Stachelberg v. Ponce*, 128 U. S. 686, 9 Sup. Ct. Rep. 200. The word "Kaiser," as applied to mineral waters, is not the subject of exclusive appropriation, where others had long used it for the same purpose: *Luyties v. Hollendeer*, 30 Fed. 632.

A design should have some utility to designate the origin or ownership. Hence, where a manufacturer uses upon his packages a large number of different names, so that the effect is to produce confusion, rather than certainty, as to origin, he cannot be protected in the exclusive use of such names as trademarks: *Albany etc. Paper Co. v. Hoberg Co.*, 102 Fed. 157.

II. What are and What are not Valid Trademarks.

a. Arbitrary and Fanciful Names.—The kind of words most frequently selected by manufacturers as trademarks for the purpose of designating their goods and distinguishing them from others, and the kind chosen with the most uniform success, are words which are arbitrary or fanciful in character. Indeed, a trademark should be an arbitrary or fanciful name, not descriptive of the article itself, and which has never before been applied to such articles. Whether a word is arbitrary and fanciful, or whether it is descriptive, and hence not the proper subject of a trademark, may frequently be a very nice question. In *Selchow v. Baker*, 93 N. Y.

59, 45 Am. Rep. 169, where the terms "Sliced Animals" and "Sliced Birds," as applied to games or puzzles, and consisting of the pictures of birds or animals on cardboard and cut into strips, were held to be good trademarks, the court thus states the well-recognized rule: "Where a manufacturer has invented a new name, consisting either of a new word, or a word or words in common use which he has applied for the first time to his own manufacture, or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name." The most general rules alone can be stated. Each case depends so entirely upon its own facts and circumstances that it will be necessary to enumerate what have and what have not been deemed arbitrary or fanciful words so as to be the subject of a valid trademark. The following have been held arbitrary or fanciful names and good trademarks: "Twin Brothers Yeast," in connection with the portraits of twins: *Burton v. Stratton*, 12 Fed. 696; "Electro-Silicon," as applied to a finely pulverized white powder used for polishing gold, silver, and other metals; *Electro-Silicon Co. v. Hazard*, 29 Hun, 369; "Parabola," as applied to needles: *Roberts v. Sheldon*, 8 Biss. 398, Fed. Cas. No. 11,916; "Celluloid," as applied to goods manufactured by the complainant, which term was a new and arbitrary word coined by the plaintiff: *Celluloid Mfg. Co. v. Read*, 47 Fed. 712. "Tin Tag," or "Wood Tag," as an arbitrary term given to goods, may be a good trademark, but the person using them has no right to the exclusive use of tin or wood as a material to designate the goods: *Lorillard v. Pride*, 28 Fed. 434. The words "Warren Hose Supporter," used in connection with a cut of a hose supporter engaged with a stocking, are sufficiently arbitrary to fairly denote the origin of the goods, and constitute a good trademark: *Frost v. Rindskopf*, 42 Fed. 408. "Cottolene," designating a substitute for lard composed of cottonseed oil and a product of beef fat, is an arbitrary term, and not descriptive: *Fairbank Co. v. Central Land Co.*, 64 Fed. 133. "Royal," where it is applied to the entire manufacture of baking-powder of the party using it, and not to distinguish a particular grade of goods: *Raymond v. Royal Baking-Powder Co.*, 85 Fed. 231; "No-to-bac," as applied to a medicine designed to cure the tobacco habit: *Sterling Remedy Co. v. Eureka etc. Mfg. Co.*, 80 Fed. 105. Such words as "Pride," as applied to cigars: *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; and "Excelsior," as applied to soap: *Braham v. Bustard*, 1 Hem. & M. 447—may be good trademarks, if used to denote origin and not quality. But where such words as "Royal," "Imperial," and "Princely" are used to denote the superior excellence of an article, the words are descriptive, and

not arbitrary or fanciful: See *Royal Baking-Powder Co. v. Sherrel*, 93 N. Y. 331, 45 Am. Rep. 229; *Corwin v. Daly*, 7 Bosw. 233. "Royal" was said not to be descriptive of baking-powder, in *Royal Baking-Powder Co. v. Raymond*, 70 Fed. 376. "Nor," said the court, "as conveying the idea of comparative excellence, does this word touch the commodity, baking-powder, otherwise than through a metaphor which is in a high degree fanciful and remote." "Magnetic Balm," applied to a liquid medicine, is an arbitrary term, and not descriptive, the medicine containing no magnetism or electricity: *Smith v. Sixbury*, 25 Hun, 232. "Charter Oak," as applied to a particular kind of stove made and sold by the plaintiff, is an arbitrary term and a valid trademark: *Filley v. Fassett*, 44 Mo. 169, 100 Am. Dec. 275. The compound word "Ferro-Phosphorated," used to designate a new medicine, is arbitrary, and a good trademark: *Caswell v. Davis*, 35 How. Pr. 76. So, also, is the word "Sapollo," as applied to a soap: *Morgan's Sons Co. v. Schwachhofer*, 55 How. Pr. 87. "Vienna," as applied to bread: *Fleischmann v. Schuckmann*, 62 How. Pr. 92. And "Nickel-In," as used to designate a brand of cigars: *Schendel v. Silver*, 63 Hun, 330, 18 N. Y. Supp. 1. Fanciful names like "Lamoille," "Green Mountain," "Black Diamond," "Indian Pond," "Magic," and "Willoughby Lake," as applied to scythe stones manufactured and sold, may be good trademarks: *Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. 896. "Momaja," as applied to a blend of coffee, is not descriptive, but arbitrary: *American Grocery Co. v. Sloan*, 68 Fed. 539. This is true also of "Swan Down," as applied to a complexion powder: *Tetlow v. Tappan*, 85 Fed. 774; "Cough Cherries," as applied to a confection: *Stoughton v. Woodard*, 39 Fed. 902; "Valooline," a word used on packages of lubricating oil: *Leonard v. White's etc. Co.*, 38 Fed. 922; and "Kaiser," used in connection with a brand of beer: *Baltz Brew. Co. v. Kaiserbrauerei etc. Co.*, 74 Fed. 222. From this case it appears that such words as "Kaiser," "King," "Monarch," and "Royal" are not used to describe a class, grade, style, or quality, and may, therefore, be lawfully used as trademarks. "Uneeda," as applied to a biscuit, is a proper trademark: *National Biscuit Co. v. Baker*, 95 Fed. 135. "Coal Oil Johnny's Petroleum Soap," may constitute a valid trademark: *Petrolia Mfg. Co. v. Bell etc. Soap Co.*, 97 Fed. 781. As may, also, "Hunyadi," as a trademark for bitter waters, when used in connection with a bottle of special shape and labels of peculiar design: *Saxlehuer v. Elsner etc. Co.*, 179 U. S. 19, 21 Sup. Ct. Rep. 7. "Fibre Chamols," used to designate a fabric used as interlining for dresses: *American Fibre Chamols Co. v. De Lee*, 67 Fed. 329. "Lightning Hay Knives": *Hiram Holt Co. v. Wadsworth*, 41 Fed. 34. "Anti-Washboard," as applied to a particular manufacture of soap: *O'Rourke v. Central City Soap Co.*, 26 Fed. 576. "La Favorita," as applied to flour: *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. Rep. 143; *Holt v. Menen-*

dez, 23 Fed. 869. "Filo-Floss," to designate silk floss manufactured by plaintiffs: *Rawlinson v. Brainard etc. Co.*, 28 Misc. Rep. 287, 59 N. Y. Supp. 880. And "Ideal," as applied to a fountain pen manufactured by a particular company: *Waterman v. Shipman*, 130 N. Y. 301, 29 N. E. 111. Combinations of words long in use cannot be exclusively appropriated as trademarks. "What Is It," to denote a particular kind of candy, is not good, since these words have been in common use for years to designate a nondescript animal or thing: *Oakes v. St. Louis Candy Co.*, 146 Mo. 391, 48 S. W. 467. Common words of the language, or which have been adopted from a foreign language, cannot be exclusively appropriated, so far as concerns their use in good faith by others with their natural signification. Thus, the word "Hygeia" may be used by one to represent the origin and ownership of goods, but it cannot be exclusively used as a trademark so as to prevent another from employing the same term in describing his own goods, he using the word with its natural meaning: *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 72 Conn. 646, 45 Atl. 957. Here the plaintiff seems not to have been the first to use the word in this connection. Otherwise, the word "Hygeia" seems to have been considered a proper word for a trademark: See the case as first appealed in *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516, 40 Atl. 534. This case draws the distinction already noted, of the exclusive right to use a word as a trademark, and the right to be protected from unfair competition, and to protect the public from deception and fraud.

b. Descriptive Words.

1. **Descriptive of Character, Quality, or Grade.**—If a device, mark, or symbol is placed upon an article to identify its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trademark: *Columbia Mills Co. v. Aleorn*, 150 U. S. 460, 14 Sup. Ct. Rep. 151. Words cannot be valid trademarks which merely give a description of the article which is manufactured: *Hostetter v. Fries*, 17 Fed. 620. Thus, the word "Pile-Leclanche," "Pile" being synonymous with battery, and the whole meaning a battery made according to the patent of Leclanche, is merely descriptive of the kind of article sold, and is not a valid trademark: *Leclanche Battery Co. v. Western Elec. Co.*, 23 Fed. 276. Words which identify or describe the manufactured article, and not the manufacturer, cannot be appropriated as trademarks: *New York Asbestos Mfg. Co. v. Ambler etc. Co.*, 99 Fed. 85. The office of a trademark is to show the origin or ownership of an article. "The true test," said the court in *Rumford Chemical Works v. Muth*, 35 Fed. 524, as to whether words are descriptive or not, "must be not whether the words are exhaustively descriptive of the article designated, but whether in themselves, and as they are commonly used by

those who understand their meaning, they are reasonably indicative and descriptive of the thing intended. If they are thus reasonably descriptive, and not arbitrary, they cannot be appropriated from general use, and become the exclusive property of anyone." The same decision quoting from the clear opinion of Judge Folger, in *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233, continues: "Nor is the question whether the name used as a trademark will convey an exact notion of how to compound an article, so that one reading it will be able to make a like article. If the necessary effect is to inform the reader or hearer of the general characteristic and composition of the thing, it is a name which may be used with equal truth by anyone who has made and offers for sale a thing compounded of the same ingredients, and who desires to express to the public the same facts. Nor does the coupling together, in a new combination, of words which before that had been used apart, and had entered into the common scientific vocabulary, give a right to the exclusive use of such combination, where it is indicative, not of origin, maker, use, and ownership alone, but also of quality and other characteristics." It was, therefore, held in this New York case that the name "Ferro-Phosphorated Elixir of Calisaya Bark" could not be protected as a trademark, the medicine being composed chiefly of iron, phosphorus, and elixir of calisaya bark. And in the federal case from which we have quoted, protection was denied to the term "Acid Phosphate" as a trademark, because the proof showed that the name, with reasonable exactness, described the characteristics and qualities of the medical preparation. "Clinton Hematite Red" and "Metallic Clinton Paint," indicating a paint pigment made from Clinton hematite ore, are merely descriptive, and cannot be appropriated as a trademark: *Clinton etc. Paint Co. v. New York etc. Paint Co.*, 23 Misc. Rep. 66, 50 N. Y. Supp. 437. The following have been held to be merely descriptive terms, and not the subject of trademarks: "Health Food," as applied to cereal products and prepared foods: *Fuller v. Huff*, 99 Fed. 439; "Steel Shod" and "Steel Clad," stamped on shoes having the soles quilted with steel wires: *Brennan v. Emery etc. Co.*, 99 Fed. 971; "Instantaneous Tapioca," as applied to a preparation of that article as distinguished from other preparations by reason of its adaptability for immediate use: *Bennett v. McKinley*, 65 Fed. 505. The words "Taffy-Tolu," as applied to chewing-gum, since these words are descriptive of the character of the gum, rather than indicative of its origin: *Colgan v. Danheiser*, 35 Fed. 150. And "Straight Cut," as applied to cigarettes, since it is a term descriptive of the character and ingredients of the article sold: *Ginter v. Kinney Tobacco Co.*, 12 Fed. 782. "Rose" and "Vanilla," being well-known flavoring extracts bought and sold under those names, cannot be exclusively appropriated by anyone, and one using them may truthfully state that his goods are so flavored without being guilty of any infringe-

ment or imposition upon the public; *Clotworthy v. Schepp*, 42 Fed. 62. "Nourishing Stout," as applied to malt liquor: *Raggett v. Findlater*, L. R. 17 Eq. 29. "Iron Bitters," indicating a medicine: *Brown Chem. Co. v. Stearns & Co.*, 37 Fed. 360; *Brown Chem. Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. Rep. 625. "Hygienic," as applied to underwear: *Hygienic Underwear Co. v. Fleece etc. Underwear Co.*, 65 Fed. 424. "Cresylic Ointment," used to designate a medicine, the chief ingredient of which is cresylic acid: *Carbolic Soap Co. v. Thompson*, 25 Fed. 625—are descriptive. "Cramp Cure," as the name of a medicine is descriptive of its purpose and character: *Harris Drug Co. v. Stucky*, 46 Fed. 624. "Indurated Fibre," as applied to wares made of wood pulp, which has been condensed and subjected to baths in linseed oil and resin and baked, designates wood fibre which has been subjected to a hardening process, and refers to quality and characteristics: *Indurated Fibre Co. v. Amoskeag etc. Co.*, 37 Fed. 695. The term "Air Cell," used in connection with the manufacture of fire-proof material, is merely descriptive: *New York Asbestos Mfg. Co. v. New York etc. Co.*, 62 N. Y. Supp. 339; *New York Asbestos Mfg. Co. v. Ambler etc. Co.*, 99 Fed. 85. And the word "Cellular," as applied to a particular kind of cloth: *Cellular Clothing Co. v. Maxton* [1899], App. Cas. 326. "Swedish Snuff Store" is purely descriptive: *Bolander v. Peterson*, 136 Ill. 215, 26 N. E. 603. So, also, are "Trask's Selected Shore Mackerel," as applied to a particular brand of mackerel: *Trask Fish Co. v. Wooster*, 28 Mo. App. 408; and "Royal" flavoring to designate the best grade of flavoring made by a particular manufacturer: *Royal Baking-Powder Co. v. Sherrell*, 93 N. Y. 331, 45 Am. Rep. 229. "Snowflake," as applied to bread or crackers, is merely descriptive of whiteness, lightness, and purity: *Larrabee v. Lewis*, 67 Ga. 561, 44 Am. Rep. 735. "Old London Dock Gin" is indicative of the quality of the drink: *Bininger v. Wattles*, 28 How. Pr. 206. "Syrup of Figs" was held to be descriptive of a medical preparation, and not the subject of a trademark, in *California Fig Syrup Co. v. Stearns & Co.*, 73 Fed. 812, affirming 67 Fed. 1008. A contrary holding upon the same state of facts was made in *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. 175, by the circuit court of appeals for the ninth circuit.

It is frequently difficult to tell whether a term is chiefly descriptive in its character or whether it is arbitrary, and no doubt different courts would render different decisions on practically the same state of facts. While the general doctrines relative to trademarks are well established, it is not possible to lay down rules which will be absolute and unerring guides in all cases in determining whether words are so descriptive as not to be the subject of a valid trademark. Naturally, a term which would be descriptive, and thus inappropriate as a trademark under one set of circumstances, would not be true as applied to a different article. So that each case

etc. *Paint Co. v. New York etc. Paint Co.*, 23 Misc. Rep. 66, 50 N. Y. Supp. 437, where the chief characteristic of the words claimed as a trademark was descriptive of the article to which it was attached the subordinate fact that the name also showed the origin and ownership of the article could not save it from condemnation as a trademark.

If letters, figures, or other marks affixed to the goods of a manufacturer for the purpose of indicating quality only, the fact that by long-continued use they have come to signify origin or ownership will not, it seems, have the effect of changing them into a valid trademark: See *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396; *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 609. Though where they are not used strictly in a descriptive sense, if by long usage they have acquired a secondary meaning, as identifying the particular preparation of the plaintiff, it is a good trademark. So held in *Wells etc. Co. v. Siegel etc. Co.*, 106 Fed. 77, as applied to the words "Celery Compound."

8. **Generic Terms.**—A generic word cannot be employed as a trademark, and the exclusive use of such a word is not entitled to legal protection: *Goodyear etc. Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. Rep. 166; *Thornton v. Crowley*, 15 Jones & S. 527; *Humphreys' Specific etc. Medicine Co. v. Wenz*, 14 Fed. 250; *Marshall v. Pinkham*, 52 Wis. 572, 38 Am. Rep. 756, 9 N. W. 615. After an article has come to be known by a particular name, it is generic, and cannot be exclusively appropriated by anyone: *Watkins v. Landon*, 52 Minn. 389, 38 Am. St. Rep. 560, 54 N. W. 198. But the question frequently arises as to whether the man who first used the name is entitled to continue his exclusive use thereof, or whether the fact that what was originally an arbitrary and fanciful name has by long usage come to stand for the article itself, so changes the word into a generic term that it is a common word of the language, free to be used by anyone.

So far as concerns articles which have been patented, whose patent name has come to be the name of the article itself, it seems clear that with the expiration of the patent the name becomes public property as well as the patented article, and all persons have a right to deal in the article by its well-known name, and to print the name on the article itself: *Holt Co. v. Wadsworth*, 41 Fed. 34; *Air Brush Mfg. Co. v. Thayer*, 84 Fed. 640. In this last case cited the term "air brush" was held to be generic and to describe the article itself, and hence not the subject of a trademark. Similarly, in *Goodyear etc. Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. Rep. 166, the word "Goodyear" was said to be the name for a well-known class of goods produced by a process known as Goodyear's invention, and the patent having expired, the word could be truthfully used by anyone. A person cannot, under the

guise of a trademark, extend his monopoly of a patented article which has come to be known by its patented name: *Burton v. Stratton*, 12 Fed. 696; *Singer Mfg. Co. v. Stanage*, 6 Fed. 279; *Wilcox & Gibbs Sewing-Machine Co. v. Gibbens Frame*, 17 Fed. 623. The rule, however, is different if the article is not patented, and the trademark is not its patented name. In such a case, if the primary object of the trademark was to indicate the origin or ownership of the article, the mere fact that the article has obtained such a wide sale that the mark comes to be recognized as the name of the article, and has become indicative of quality, does not make the trademark common property, or deprive the one who first used the name of his right to be protected in his continued exclusive use thereof: *Burton v. Stratton*, 12 Fed. 696. In *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169, the court sustained the right to use a word as a trademark, notwithstanding that it had become so generally known that it had been adopted by the public as the ordinary appellation of the article. We believe that in principle there can be no question of the right of a person to adopt an arbitrary name to designate the origin or ownership of an article, and that his exclusive right to use such name as a trademark will continue and be protected, although it comes to stand in the public eye for the article itself or to indicate the quality of the goods. Under this principle the word "celluloid" was protected as a trademark, though it was a newly coined word which had come to stand as the proper designation of the article itself: *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94. To the same effect is *Celluloid Mfg. Co. v. Read*, 47 Fed. 712. And in *Burnett v. Chalon*, 9 Bosw. 198, "Cocaine" was protected as a valid trademark. Judge Wallace, in two cases in the circuit court of New York, seems to intimate a contrary doctrine, and apparently holds that when a new article is made and a name given to it, this name becomes, by common acceptation, the appropriate descriptive term by which the article is known, and hence becomes public property, and anyone may use the name to designate such article: *Hostetter v. Fries*, 17 Fed. 620; *Leclanche Battery Co. v. Western Elec. Co.*, 23 Fed. 276. And this rule is probably true to the extent that others can use the term to designate the product or article, but they cannot use it so as to deceive the public as to who is making the goods, or apply it in any way as a trademark: See *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94. With this qualification these cases seem not to be in conflict with the other authorities we have cited.

If the terms are otherwise generic, they cannot be appropriated as a trademark. "Continental" is a generic term, which cannot be exclusively used by anyone: *Continental Ins. Co. v. Continental Fire Assn.*, 96 Fed. 846. "Homeopathic Specific" is a generic term, meaning a remedy pertaining to homeopathy which prevents or cures a particular disease, and is not a good trademark of itself:

Humphrey's etc. Medicine Co. v. Wenz, 14 Fed. 250. "Aluminum," as applied to an article of manufacture composed in part of that metal, cannot be monopolized as a trademark: American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281.

3. **Descriptive of Use or Purpose.**—Words descriptive of the use or purpose to which the article is to be devoted are generally held to be merely descriptive terms, not indicative of origin or ownership, and not capable of being exclusively appropriated as a trademark. For example, the words "Cramp Cure," were said to be merely descriptive of the purpose and character of the medicine, and could not be appropriated as a trademark: Harris Drug Co. v. Stucky, 46 Fed. 624. The words "Cough Remedy" cannot constitute a good trademark: Gilman v. Hunnewell, 122 Mass. 139. "Air Brush" indicates a mode of use, is descriptive, and not a valid trademark: Air Brush Mfg. Co. v. Thayer, 84 Fed. 640. A manufacturer of medicine can gain no exclusive right to the use of the words "Headache Wafers" as a trademark: Gessler v. Grieb, 80 Wis. 21, 27 Am. St. Rep. 20, 48 N. W. 1098. "Microbe Killer," as applied to a medicine intended to kill microbes, is merely descriptive of use, and cannot constitute a trademark: Alf v. Radam, 77 Tex. 530, 19 Am. St. Rep. 792, 14 S. W. 164; Radam v. Microbe Destroyer Co., 81 Tex. 122, 26 Am. St. Rep. 783, 16 S. W. 990. "Health Food," as applied to manufactured foods: Fuller v. Huff, 99 Fed. 439; and "Hygienic," applied to underwear: Hygienic Underwear Co. v. Fleece Hygienic Underwear Co., 65 Fed. 424, are descriptive of the purpose for which the articles are used, and hence are not the subject of a trademark. Other illustrations may be found elsewhere in this note of words which were denied protection as a trademark because descriptive of use or purpose: See, also, Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76.

While a person may not acquire a trademark in a word which is purely descriptive of the purpose for which the article is used, yet here, as elsewhere, a party may be protected in his business from unfair competition, and the public from fraud and deception. So where one imitates the labels and wrappers of another for the purpose of deceiving the public and of taking away custom from another dealer, the injured party will be protected, whether his label is technically a valid trademark or not. Under this rule a complainant was protected in his use of "Nerve Food," as applied to a beverage, in Moxie Nerve Food Co. v. Beach, 38 Fed. 248. And in McLean v. Fleming, 96 U. S. 245, a manufacturer of medicines was protected in his use of "McLane's Liver Pills."

4. **Describing Ingredients or Composition.**—Words merely descriptive of the ingredients or composition of an article cannot be claimed as a trademark. Thus, "Iron Bitters" was held to be so far indicative of the ingredients and composition of the article

as to render the term incapable of appropriation as a trademark: *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. Rep. 625; *Brown Chemical Co. v. Myer*, 31 Fed. 453; *Brown Chemical Co. v. Stearns & Co.*, 37 Fed. 360. The words "Indurated Fibre," as applied to wares made of wood pulp, so far refers to ingredients and composition as to be invalid as a trademark: *Indurated Fibre Co. v. Amoskeag etc. Co.*, 37 Fed. 695. "Straight Cut," as applied to cigarettes, is descriptive of the ingredients used and cannot be appropriated as a trademark: *Ginter v. Kinney Tobacco Co.*, 12 Fed. 782. In *California Fig Syrup Co. v. Stearns*, 73 Fed. 812, the words "Syrup of Figs" were held to be so descriptive of the composition and ingredients of a medicine as not to be the subject of a trademark. A contrary rule was announced in *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. 175. The following words and terms have been held invalid as trademarks on the ground that they were merely descriptive of the ingredients or composition of the article: "Cresyllic Ointment," as applied to a medicine one of the principal ingredients of which was cresyllic acid: *Carbolic Soap Co. v. Thompson*, 25 Fed. 625. "Acid Phosphate," as applied to a medicinal preparation: *Rumford Chemical Works v. Muth*, 35 Fed. 524. "Ferro-Phosphorated Elixir of Calisaya Bark," a prepared medicine, the ingredients of which were chiefly iron, phosphorus and calisaya bark: *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233. "Rye and Rock," applied to a mixture of rock candy and rye whisky: *Van Bell v. Prescott*, 82 N. Y. 630. "Elixir of Calisaya Bark with Iron," and "Fluid Extract of Buchu," as applied to medicines: *Hegeman & Co. v. Hegeman*, 8 Daly, 1. "Helmhold's Highly Concentrated Compound Fluid Extract of Buchu," applied to a medicine: *Helmhold v. Helmhold Mfg. Co.*, 53 How. Pr. 453. "Clinton Hematite Red" and "Metallic Clinton Paint," indicating a paint made from Clinton Hematite ore: *Clinton Metallic Paint Co. v. New York etc. Paint Co.*, 23 Misc. Rep. 66, 50 N. Y. Supp. 437.

5. **Descriptive Meaning an Acquired One.**—As already intimated, the rule undoubtedly is that if the primary object of a trademark is to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to make the trademark the common property of the public: *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396. For, as was said in *Burton v. Stratton*, 12 Fed. 696, "to hold otherwise would be to deprive the owner of the exclusive use of his trademark just at the time when it had become most valuable to him and stood most in need of protection." And the court, in *Selchow v. Baker*, 93 N. Y. 59, 45 Am. St. Rep. 169, speaking to the same question, said: "The value of a trademark consists in its becoming known to the trade as the mark of the manufacturer who has

invented or adopted it, and in being known to the public as the name of an article which has met with popular favor. It cannot be that the very circumstances which give it value operate at the same time to destroy it": See, also, *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 82 Fed. 94.

c. **When Words not Sufficiently Descriptive.**—We have already cited a large number of cases in which it has been held that the words adopted as a trademark were not sufficiently descriptive to invalidate their exclusive use by the one employing them, either because they were arbitrary or fanciful terms, or their descriptive character was an acquired one, or the words were merely suggestive and not really descriptive. At this point attention will be called only to those cases which are not collected elsewhere. In *Price Baking-Powder Co. v. Fyfe*, 45 Fed. 799, the word "Cream," in connection with the words "Baking-Powder" was held not to be descriptive of an ingredient of the article, or of its quality or kind, and could, therefore, be properly employed as a trademark. Where a manufacturer made and sold scythe stones under trade names as "Lamoille," "Green Mountain," "Black Diamond," "Indian Pond," "Magic," and "Willoughby Lake," these names were held to indicate a selection and care in manufacturing and not to indicate quality alone: *Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. 896. And in *Pennsylvania Salt Mfg. Co. v. Myers*, 79 Fed. 87, in passing on the term "Saponifer" as a trademark, the court said that while perhaps such a word might be suggestive to a Latin student of an article used in soap making, yet it was not so descriptive to ordinary purchasers as to prevent its appropriation by the one who coined the word. "Cottolene," as applied to a substitute for lard composed of cotton-seed oil and the product of beef fat, was held not to be so descriptive of the substance and quality of the component parts of the article as to prevent its use as a trademark: *Fairbank Co. v. Central Lard Co.*, 64 Fed. 133. The word "Parabola," as applied to needles, not being descriptive of any peculiar quality of needles, is a valid trademark: *Roberts v. Sheldon*, 8 Biss. 398, Fed. Cas. No. 11,916. "Hoxie's Mineral Soap" and "Hoxie's Pumice Soap" were declared to be good trademarks in *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713. The words "Electro-Silicon," as applied to a white powder used for polishing gold, silver, and other metals, may be used as a trademark, though it contains some silicon, in the form of silica, or silicic acid: *Electro-Silicon Co. v. Hazard*, 29 Hun, 369. "Magnetic," in the trademark "Universal Magnetic Balm," was said to be used in a figurative, and not descriptive, sense, the medicine not containing any properties of magnetism: *Ransom v. Ball*, 54 Hun, 635, 7 N. Y. Supp. 238. The word "Grenade," as applied to a syrup manufactured from the juice of the pomegranate, was protected as a valid trademark, though the word "Grenade" was a

French word, meaning pomegranite: *Rillet v. Carlier*, 61 Barb. 435. The word "Hygela," as used by a water company in the sale of its water, is not so descriptive as to invalidate its use as a trademark: *Hygela Distilled Water Co. v. Hygela Ice Co.*, 70 Conn. 516, 40 Atl. 534. "Nickel Store," used as a sign in connection with the business of a merchant who does not buy or sell nickel, and whose goods are not sold for a nickel, is not descriptive, and hence may be a valid trademark or trade name: *Duke v. Cleaver*, 19 Tex. Civ. App. 218, 46 S. W. 1128.

d. **Suggestive Words.**—Words merely suggestive are not invalid as trademarks unless they are descriptive. Words suggestive of some supposed advantage to be derived from using the article, or suggestive of some effect produced by its use, are ordinarily valid as trademarks: *O'Rourke v. Central Soap Co.*, 26 Fed. 576. The cases themselves illustrate this distinction. Thus the word "Mojama," as applied to a blend of Mocha, Maracaibo, and Java coffees, is suggestive of such composition, but is not sufficiently descriptive to invalidate it as a trademark: *American Grocery Co. v. Sloan*, 68 Fed. 539. "Cottolene," though suggestive of the cotton-seed oil, which is one of its compounds, is not sufficiently descriptive to render it an invalid trademark: *Fairbank Co. v. Central Lard Co.*, 64 Fed. 133. "Fibre Chamols," as applied to a fabric for lining dresses, is good, though suggestive of a fabric having the appearance of chamols leather: *American Fibre Chamols Co. v. De Lee*, 67 Fed. 329. As is also "Anti-Washboard," as applied to a manufacture of soap, since these words are suggestive rather than descriptive: *O'Rourke v. Central City Soap Co.*, 26 Fed. 576. "Pain-killer," applied to a medical compound: *Davis v. Kendall*, 2 R. L. 566; and "Blood-Searcher," as applied to a medicine: *Fulton v. Sellers*, 4 Brewst. 42—are good; and in *O'Rourke v. Central City Soap Co.*, 26 Fed. 576, the court points out that such words as "Invigorator," as applied to a bed-bottom, "Samson Brace," as applied to suspenders, "Annihilator," as applied to a medicine, "Zero," as applied to a water-cooler, "Arctic," to a soda fountain, and "Day Light," "Sun Light," and "Gas Light," to illuminating oils have been held good trademarks, though suggestive in their meaning. But in *Harris Drug Co. v. Stucky*, 46 Fed. 624, the words "Cramp Cure" were considered so clearly descriptive as to be incapable of appropriation as a trademark when applied to a medicine, though a picture of a boy in a position indicating that he was suffering from cramps would be good. Whether a word is merely suggestive or so descriptive as to render it incapable of exclusive appropriation as a trademark, depends upon the circumstances of each case. A word merely suggestive may be a good trademark, though it is also indirectly or remotely descriptive: *Bennett v. McKinley*, 65 Fed. 505. In this case "Instantaneous," as applied to a preparation of taploca, which was adaptable

for immediate use without preliminary soaking, was deemed descriptive, and not a valid trademark. The mere fact that the word "Hygeia," by association of ideas, would suggest to some people idea of purity or healthfulness, does not prevent its use as a valid trademark: *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516, 40 Atl. 534.

e. Proper and Personal Names.

1. Name of Inventor, Maker, or Proprietor.—A person may, at least in a limited sense, acquire a trademark in the use of his own name in connection with his business. The right to use such name, where it has come to be well known as a trade name, will be protected against infringement by another who has no right to use it, or who is using it for the purposes of deception. And similarly a person may arbitrarily adopt a personal name as his business name, and after having made a reputation for his business or articles under such name he will be protected in its use from the unlawful use of such name by another. Thus, where one whose name was not "Cameron" built up a valuable business under the name "Cameron's," he will be protected in its exclusive use as against one who uses such name (not his own) in a similar business, and thus deceives the public: *Church v. Kresner*, 26 App. Div. 349, 49 N. Y. Supp. 742. One will be protected in the exclusive use of his own name, which has become a valuable trademark, as against one who is not of the same name: *Hohner v. Gratz*, 52 Fed. 871; *Rathjen's American Comp. Co. v. Holzappel's Comp. Co.*, 101 Fed. 257; *Burke v. Cassin*, 45 Cal. 467, 13 Am. Rep. 204. In this last case the court said that "the name of a manufacturer or seller of goods may, of course, be used as a trademark; and the adoption of the same name as a trademark for goods of the same kind, by a person bearing a different name, is without justification or excuse, and presents one of the clearest cases of piracy of a trademark." And in *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, 39 N. E. 490, the court said that "an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purposes of deception, or even when innocently used without right to the detriment of another." Whether a person in any particular case has the exclusive right to use a personal name as a trademark depends upon the circumstances of that case. But there can be no doubt that a person is entitled to protection from the fraudulent use of his name by another. One manufacturer will not be permitted to stamp on his goods the name of another manufacturer: *Goodyear Rubber Co. v. Day*, 22 Fed. 44. Under the circumstances of particular cases it is probably true that a technical trademark cannot be acquired in a personal name, in the

sense that one is entitled to the exclusive use of the name: See *Decker v. Decker*, 52 How. Pr. 218, where the trademark of a piano was involved; and *Garrett v. Garrett & Co.*, 78 Fed. 472, where "Garrett's Snuff" was the article sold. And yet, as pointed out by this last case, one may be entitled to protection from the fraudulent use of a name by another, though it is not a real trademark: See, also, *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346, 63 Pac. 480; *Frazier v. Dowling*, 18 Ky. Law Rep. 1109, 39 S. W. 45; *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Lamb Knit Goods Co. v. Lamb etc. Co.*, 120 Mich. 159, 76 N. W. 1072.

3. **Different Persons of Same Name.**—The right to use a personal name as a trademark is involved in more difficulty, when there are others of the same family name who are using such name in a similar business. It has been said in some of the cases that a person cannot make a trademark of his own name and thus debar others, having the same name, from using it in their business: *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489. But as was pointed out in *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346, 63 Pac. 480, this rule is true to a limited extent only. "If the name is used in a manner clearly indicating an intent to mislead and deceive the public, then the use of the name will be restrained by a court of equity." And we stated at the beginning of this note that there are two rights involved in the use of a trademark: 1. The exclusive right to use a name; and 2. The right to be protected from unfair competition and to protect the public from deception. The use of family names is an excellent example of what may be protected as a trademark in the second sense, though it may not be a technical trademark within the first meaning. The case of *Church v. Kresner*, 26 App. Div. 349, 49 N. Y. Supp. 742, indicates clearly this distinction between the right of property in a personal name and the right of a person who has established a trade under a given name to be protected from the fraudulent use of such name by another. The cases furnish numerous examples of this distinction.

Generally speaking, every person is entitled to use his own name in connection with any business which he is carrying on. As was aptly stated in *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. Rep. 625: "A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest, and fair exercise of such right, he is no more liable for the incidental damage he may do a rival in trade than he would be for injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land." In this case the court found that there was no such evidence of fraud or imposition on

the public as to authorize an interference with another in the use of his own name in the selling of medicine. In stating what test should be applied to ascertain whether one has a right to use his own name in connection with his own wares, the court said, in *England v. New York Pub. Co.*, 8 Daly, 375: "The fact that a man has used his own name to designate the article he produces, and that the name has become valuable to him through the article becoming extensively known, gives him no right to exclude any other man of the same name from affixing his name upon the same kind of article, if he manufactures it. The test is, whether he uses the name honestly and fairly in the ordinary prosecution of his business, or dishonestly, to palm off his own commodity as the production of another." In *Rogers Mfg. Co. v. Simpson etc. Co.*, 54 Conn. 527, 9 Atl. 395, both parties were held entitled to use the name "Rogers" on their silverware where the second bearer of the name used distinguishing marks to prevent the public from being deceived, and where there was no intent to mislead purchasers. *Rogers Bros. v. Rogers*, 53 Conn. 121, 55 Am. Rep. 78, 1 Atl. 807, 5 Atl. 675, was a similar case, where both parties were held entitled to use the name, there being no false representation by the second user that his goods were those of the first. The incidental deception of the public merely from the fact of using the same name, and the injury to the other manufacturer were deemed to be immaterial. In *Carmichel & Co. v. Latimer etc. Co.*, 11 R. I. 895, 23 Am. Rep. 481, both parties truthfully used "Stillman & Co.," on their goods, and since no fraudulent purpose was intended by the second user, he was permitted to continue therein, the first user having no exclusive right in the name. In *Clark v. Clark*, 25 Barb. 76, both parties were said to have the right to advertise that they made "Clark's Spool Cotton," but that the defendant could not express this truth by means of such designs as to appear to imitate the plaintiffs. One can use his own name, though it is the name of another, but he cannot use the devices of another. Hence, one cannot add to his own name imitations of another's labels, boxes, or packages in such a way as to induce the public to believe that his goods are the goods of the one he is imitating: *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. Rep. 625. So in *McLean v. Fleming*, 96 U. S. 245, a person was enjoined from using his own name in the sale of pills, where they were put up in such form that purchasers exercising ordinary caution were likely to be misled. In *Ward & Co. v. Ward*, 61 Hun, 625, 15 N. Y. Supp. 913, the plaintiff was held to have no exclusive right to use the term "Ward & Co." where there was otherwise no such similarity in device as to mislead purchasers. And a similar decision was given in *Faber v. Faber*, 49 Barb. 357, as to the name "Faber" stamped on lead pencils, notwithstanding the defendant used substantially the same color and kind of paper for wrappers.

But in *Frazier v. Dowling*, 18 Ky. Law Rep. 1109, 39 S. W. 45, where the plaintiffs had established a reputation for whisky branded as "Waterfall & Frazier," for twenty years before the defendants commenced business, they were held to be entitled to the exclusive use of such name, the defendants adopting the name for the purpose of getting the benefit of the reputation of the old brand of whisky. Where there is evidence of actual deception, a defendant will not be allowed to use his own name in such a way as to deceive, if this is the evident purpose of the defendant in using his name: *Jennings v. Johnson*, 37 Fed. 864. In this case the plaintiff was held entitled to use the term "Johnson's Anodyne Liniment," though his name was not Johnson, as against the fraudulent use thereof by one whose name was Johnson. And in *Landreth v. Landreth*, 22 Fed. 41, the plaintiff was deemed entitled to the exclusive right to use his name in connection with goods sold, "Extra Early Peas," as against another of the same name who used his name in such form as to constitute a false representation of the origin of his goods, and thereby inducing purchasers to believe that they were purchasing the goods of the plaintiff. In *Shaver v. Shaver*, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188, the plaintiff, who had for years made and sold wagons as "Shaver Wagon, Eldora," was held to have the exclusive right to use this form of trademark as against another of the same name, who copied the trademark in such a way as to deceive the public. In *Howe v. Howe Machine Co.*, 50 Barb. 236, the court went so far as to hold that the plaintiff could appropriate the mere word "Howe" as a trademark to designate his sewing-machine, as against one who had the same surname. We doubt the correctness of this decision so far as it seems to announce such an extreme doctrine that one cannot use his own surname to designate the machines which he makes, though the general doctrine running through the case is correct—namely, that one cannot use his own name in such a way as to deceive the public and to represent his goods as and for the goods of another. What we doubt is whether the mere fact that one uses his surname to designate a machine he makes is such a use as can legally come within this doctrine. The right to use one's own name as a trademark, as against others of the same name, exists only where such others use a mark or label so like his as to represent that their goods are of his make or manufacture: *Gilman v. Hunnewell*, 122 Mass. 139; *El Modello Olgar Mfg. Co. v. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537, 7 South. 23. In *Robinson v. Storm*, 103 Tenn. 40, 52 S. W. 880, the plaintiff was given the exclusive right to use the words "Storm's Liver Regulator," as against another of the same name. The court said that the plaintiff had the right to such a trademark if the defendant's simulation was likely to deceive an incautious and ordinary purchaser. The use of a surname in connection with other words or devices

will generally be protected from the fraudulent use by another of the same surname. Thus "Le Page's Liquid Glue" was held a good trademark, and not to be infringed by another whose name was Le Page, and who used the device "Le Page's Improved Liquid Glue": *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304. A man has a right generally to use his own name in his own business, though such use incidentally injures another, but "the courts require that the name shall be honestly used, and they permit no artifice or deceit, designed or calculated to mislead the public and palm off the business as that of the person who first established it and gave it its reputation." This was said in a case where the plaintiff was held entitled to use the term "Higgins Soap," as against the defendant, who was using the phrase "Higgins Soap Co.": *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, 39 N. E. 490; and even in the case of patents where after the expiration of the patent the whole world is entitled to use the name of the patented article, it has been held that another than the original manufacturer might be compelled to so use the patent name as to indicate that the article was not manufactured by the proprietors of the extinct patent. Applied in the use of the word "Singer," in connection with sewing-machines, in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002. Most of the cases where protection has been accorded one in the use of his own name as a trademark have turned on the question of fraud and deception practiced upon the public, and not upon the technical right to the exclusive use of a name as a trademark. The many cases cited illustrate this. See, also, *Stuart v. Stewart Co.*, 91 Fed. 243, where the plaintiff was given protection in his right to use the term "Stuart's Dyspepsia Tablets."

8. **Corporate Names.**—As may be seen from the cases already cited, the name of a corporation may be adopted as a trademark or trade name and given protection as such. The same rule applies to the names of corporations as to the names of firms or individuals: *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, 39 N. E. 490; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94; *Celluloid Mfg. Co. v. Read*, 47 Fed. 712; *Holmes v. Holmes etc. Co.*, 37 Conn. 278, 9 Am. Rep. 324; *Newby v. Oregon Cent. Ry. Co.*, Deady, 609, Fed. Cas. No. 10145. Indeed, a corporate name would seem to be much more clearly entitled to protection as a trademark than the mere surname of an individual, because a corporate name is always an arbitrary one, wholly independent of the names of its stockholders or directors. This distinction seems to be recognized in some of the cases: See *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446; *Lamb Knit Goods Co. v. Lamb etc. Co.*, 120 Mich. 159, 78 N. W. 1072.

But a corporate name which is merely descriptive is not the subject of a valid trademark, such as the words "International Banking Company": *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235. So where the name is merely descriptive of a well-known class of goods, as "Goodyear Rubber Company": *Goodyear etc. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. Rep. 166. Even though a corporation may have no exclusive right to use a name as a technical trademark, yet it may be protected from unfair competition and the right to use a name reserved to it so as to prevent the public from being deceived and imposed upon. Hence, where one corporation has adopted as its name the names of some of its stockholders, a rival corporation having some stockholders of the same name cannot use the names of such stockholders as its corporate name so as to mislead those dealing with them into the belief that the two companies are the same: *Holmes v. Holmes etc. Co.*, 37 Conn. 278, 9 Am. Rep. 324. The courts interfere in such cases, not on the ground that the state cannot give to corporations whatever names it sees fit, but solely for the purpose of preventing fraud, actual or constructive: *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, 39 N. E. 490.

4. **Personal Fictitious Names.**—Proper names or personal names used in a fictitious sense may be appropriated as trademarks. They are clearly terms arbitrarily selected to represent the articles to which they are attached. Thus, the name "Roger Williams," as applied to a particular kind of cloth, was protected as a valid trademark: *Barrows v. Knight*, 6 R. I. 434, 78 Am. Dec. 452. "Bismarck," as applied to the plaintiff's make of paper collars: *Messe-rolle v. Tynberg*, 4 Abb. Pr., N. S., 410. "Martha Washington," used to designate a special kind of prepared flour: *Martha Washington Creamery Buttered Flour Co. v. Martien*, 44 Fed. 473; *Martha Washington Creamery Buttered Flour Co. v. Martien*, 37 Fed. 797. And "German Sweet Chocolate," arbitrarily selected to designate a make of chocolate: *Walter Baker & Co. v. Baker*, 77 Fed. 181.

f. Geographical Names.

1. **In General.**—Merely geographical names cannot usually be appropriated so as to be made the subject of an exclusive trademark. Anyone living in a locality has a right to use such name to designate the place from which his goods come. This is analogous to the right of a person to use his own name to designate his own business or the goods made by him. Thus, "Pocahontas," as applied to coal coming from a locality known as the "Great Pocahontas Coal Field of Virginia and West Virginia," being a geographical term, cannot be exclusively appropriated as a trademark, and all producers of coal in that section have a right to designate their coal as "Pocahontas Coal": *Coffman v. Castner*, 87 Fed. 457; affirmed in 178 U. S. 168, 20 Sup. Ct. Rep. 842. The term "Green Mountain," as applied to grapes and grapevines, the product of

stock from the Green Mountains, cannot be used as a trademark: *Hoyt v. Lovett Co.*, 71 Fed. 173. "Montserrat," as a designation for lime juice, cannot be exclusively appropriated, where the word is the name of an island from which both parties import their product: *Evans v. Von Laer*, 82 Fed. 153. An exclusive trademark cannot exist in the name of a city in which a thing is made by manufacturers in such city: *New York etc. Cement Co. v. Coplay Cement Co.*, 45 Fed. 212, affirming 44 Fed. 277. The alleged trademark in these cases was "Rosendale Cement," indicative of the place where it was made, and the court further points out that there can be no trademark in such terms as "New York Soap," and "Havana Cigars." Geographical words cannot be appropriated as trademarks, though they represent a large section of country, such as "Columbia," used to designate a brand of flour: *Columbia Mill Company v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. Rep. 151; or "East Indian" remedy, applied to a particular kind of medicine: *Connell v. Reed*, 128 Mass. 477, 35 Am. Rep. 397; or "International," to designate a banking company: *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235. "Sonman," as applied to coal, coming from a large boundary of land of that name, cannot be adopted as a trademark by one person to the exclusion of others: *Laughman's Appeal*, 128 Pa. St. 1, 18 Atl. 415. Neither can the word "Brunswick," as applied to asphalt made chiefly from rock asphalt obtained from the duchy of Brunswick, so as to prevent others from using the same name under similar circumstances: *Gabriel v. Sicilian etc. Co.*, 56 N. Y. Supp. 80, affirming 52 N. Y. Supp. 722, 23 Misc. Rep. 534. Nor the name of a town, "Moline," to designate plows, though the plows from that place as made by one manufacturer have gained celebrity as "Moline Plows": *Candee, Swan & Co. v. Deere*, 54 Ill. 439, 5 Am. Rep. 125. Nor the name of a valley, "Genesee," to denote a manufactured salt, where there are others who can with equal truth use the same name: *Genesee Salt Co. v. Burnap*, 73 Fed. 818. Nor "Lackawanna," as applied to coal mined in the valley known by that name: *Canal Co. v. Clark*, 13 Wall. 811. This last case is a leading one on this point, and frequently cited, and in the course of its opinion the court said: "It may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

As applied to the name of a town or locality, the case of *Atwater v. Castner*, 88 Fed. 642, intimates that if a dealer or manufacturer establishes a business and builds up an extensive trade, and sub-

sequently his trade name becomes the distinctive name of the locality where his business is pursued, he is not thereby prevented from having a trademark right in the name. But this doctrine was denied in an earlier case in Pennsylvania (*Glendon Iron Co. v. Uhler*, 75 Pa. St. 467, 15 Am. Rep. 599), where the plaintiff had adopted the trademark "Glendon," which was used on their iron. Subsequently the place where the company's furnaces were located was made a borough by the name of "Glendon," and the court held that the plaintiff had no exclusive right to use the name as its trademark, since it was the name of a town, and anyone else making iron in that place could rightfully use the same name.

Under the rule that a trademark should state the truth, and should not be so used as to mislead and deceive the public, it would seem that the right of one who lives in a particular locality to use a geographical name upon his goods to designate them would be protected as against one who, not residing in that locality, falsely uses the name to designate his product. Hence it has been held that one who has for years used geographical names to distinguish his goods will be protected in their use as against one who does not carry on business in the districts so designated: *Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. 896.

In *Southern White Lead Co. v. Carey*, 25 Fed. 125, relief was granted against the using of the word "St. Louis" to designate white lead, where the public was actually misled, and the use of the name was a palpable trick to secure trade, and the plaintiff was actually injured. And in *Anheuser-Busch Brewing Assn. v. Piza*, 24 Fed. 149, the plaintiffs were held entitled to be protected in the use of the words "St. Louis Lager Beer," as against the defendant, whose beer was made in New York, and whose use of the term was in effect a representation that his beer was the product of the plaintiff. These cases are decided mainly on the ground of fraud and unfair competition. The principle is that one shall not be permitted, by the adoption of a trademark which is untrue and deceptive, to sell his goods as those of another and thus deceive the public and injure his competitor: *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588, where the word "Akron" was used by the defendants to designate their cement for the purpose of availing themselves of the reputation of the plaintiffs. See, also, *Canal Co. v. Clark*, 13 Wall. 311. But where there is no fraud and the public is not likely to be misled, relief will not be given, since in the geographical term itself, aside from all other considerations, an exclusive right to use as a trademark cannot be acquired: See *Evans v. Von Laer*, 32 Fed. 153; *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467, 15 Am. Rep. 599. Certainly, one who falsely represents that his goods are manufactured in a certain place has no right to the use of such name as a trademark: *Coleman etc. Co. v. Dannenberg Co.*, 108 Ga. 784, 68 Am. St. Rep. 143, 30 S. E. 639. The case of

New York etc. Cement Co. v. Coplay Cement Co., 44 Fed. 277, seems opposed to the doctrine already stated, and the rule seems to be announced that a trademark cannot be acquired in the use of a geographical name even as against one who does not live in the locality, and who falsely represents that his goods are manufactured there. So far as this case seems to hold that a manufacturer cannot be protected in the use of a geographical name as against one who falsely and fraudulently uses it for the purposes of deceiving the public and of representing his goods to be those of another, it is clearly opposed to the great weight of authority. In the recent case of California etc. Assn. v. Myer, 104 Fed. 82, canning companies in California who used the term "California Fruit" as a trade designation, and whose fruit had become well and favorably known under such name, were held^e entitled to an injunction as against Maryland fruit growers who falsely and fraudulently used the same kind of label for canned fruit.

A case arises occasionally in which a geographical term has been used for such a long period and so widely that it has come to have a secondary meaning wholly disconnected from its geographical signification, and the question is presented as to what extent the one who has so used the term to designate his goods is entitled to protection as against another who makes the same article in the same place and employs the name of the place to designate the article. The principal cases which have arisen in this country have related to the names "Waltham" and "Elgin," as applied to well-known makes of watches. The supreme court of Massachusetts ably discussed the question in the recent case of American etc. Watch Co. v. United States Watch Co., 173 Mass. 85, 73 Am. St. Rep. 263, 53 N. E. 141, and held that where the defendant used the word "Waltham" upon the plates of its watches, with the fraudulent intention of diverting the plaintiff's custom to itself, and this effect was accomplished, it must so use the name as to distinguish its watches from those of the plaintiff. In the course of its opinion the court said, in pointing out the conflicting rights and claims of the two parties: "It is desirable that the plaintiff should not lose custom by reason of the public mistaking another manufacturer for it. It is desirable that the defendant should be free to manufacture watches at Waltham, and to tell the world that it does so. The two desiderata cannot both be had to their full extent, and we have to fix the boundaries as best we can. On the one hand, the defendant must be allowed to accomplish its desideratum in some way, whatever loss to the plaintiff. On the other, we think the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense. . . . Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in the field,

may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom." We believe this decision is sound, and correctly states both the right of every individual to correctly state where his wares are manufactured, and the right of one who has built up a valuable business to be protected from unfair competition and from the fraudulent representation that another's wares are his own. This case was followed in the later case of *American Waltham Watch Co. v. Sandman*, 96 Fed. 330. The distinction between the right to the exclusive appropriation of a geographical name as a technical trademark which does not exist, and the right to be protected from false and fraudulent representation as to origin and ownership of goods, is well illustrated by these cases, and especially by the cases involving the use of the word "Elgin": See *Illinois Watch Case Co. v. Elgin National Watch Co.*, 94 Fed. 667, affirmed in *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. Rep. 270. As indicated by the syllabus of this last citation, the court held that "where such a word has acquired a secondary signification in connection with its use, protection from imposition and fraud will be afforded by the courts, while at the same time it may not be susceptible of registration as a trademark": See, also, *Genesee Salt Co. v. Burnap*, 73 Fed. 618, where this distinction was recognized.

Where a geographical term is not used in a geographical sense, it may be appropriated as a trademark. Thus, "Vienna," as applied to bread made in this country, was protected in *Fleischmann v. Schuckmann*, 62 How. Pr. 92. And "Green Mountain," "Indian Pond," and "Willoughby Lake," as applied to scythe stones: *Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. 896.

A geographical name may be used in the sale of an article whose chief value consists in the name of the place from which its chief ingredients come. Thus, where one manufactured asphalt in New York, from a basis of eighty per cent rock asphalt quarried in Brunswick, Germany, he may lawfully sell it as "Brunswick Rock Asphalt," as against one manufacturing the same article in Brunswick: *Gabriel v. Sicilian etc. Co.*, 23 Misc. Rep. 534, 52 N. Y. Supp. 722. Such words as "Hoosier," as applied to a grain drill: *Julian v. Hoosier Drill Co.*, 78 Ind. 408; and "Yankee," used to designate soap: *Williams v. Adams*, 8 Biss. 452, 1 Fed. Cas. No. 17,711—are not geographical names, and may be appropriated as valid trademarks.

2. **Mineral Waters.**—Mineral waters obtained from a spring of a certain name seem, in a sense, to form an exception to the rule that geographical names cannot be used exclusively as a trademark. Ordinarily, however, we doubt whether the name of a spring can be properly considered a geographical name. Especially

is this true where the spring is owned entirely by one person or corporation, who has given to it an arbitrary name. Hence, it is held that where a spring has been given a particular name, and its waters sold by such name, the name constitutes a valid trademark which will be protected from infringement. This rule was applied to "Congress" water, in *Congress Springs Co. v. High Rock Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82; "Bethesda" water from a spring of that name, in *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395; to "Clysmic" water, in *Hill v. Lockwood*, 32 Fed. 389; to "Blue Lick" water, in *Northcutt v. Turney*, 101 Ky. 314, 41 S. W. 21; and to "Carlsbad Salts," made from Carlsbad mineral waters, in *Carlsbad v. Thackeray & Co.*, 57 Fed. 18. This last case comes nearer than any we have cited to a real case involving a geographical name, as Carlsbad was the name of a city. But as indicated in *Carlsbad v. Kutnow*, 63 Fed. 794, Carlsbad was also the name of the springs, and not merely the name of a city, and the fact that it was a geographical name does not prevent the city of such name from having an exclusive right to the use thereof in connection with the springs owned exclusively by it. The defendants in these cases were manufacturers of salts in this country, while the Carlsbad springs were located in Austria, and the relief would probably have been granted to prevent imposition on the public and unfair competition with the plaintiff. If the name is a real geographical name, it is doubtful whether any technical trademark can be acquired therein, but there is no doubt that relief will be granted if a case of deception is made out. Thus, in the cases of *La Republique Francaise v. Schultz*, 94 Fed. 500, and *La Republique Francaise v. Saratoga Vichy Springs Co.*, 99 Fed. 733, the word "Vichy" was held to be a geographical name, not the subject of a trademark in a legal sense, and the plaintiff was held to be entitled to relief only on the ground of unfair competition. If there is actual deception, an injunction will be granted, as was held in *Actien-Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Blatchf. 380, Fed. Cas. No. 496, as applied to the words "Apollinaris" water. But if the defendant is actually selling the plaintiff's water and no misrepresentation is made, an injunction will be denied. So held where "Hunyadi-Janos" water was sold by the defendant: *Apollinaris Co. v. Scherer*, 27 Fed. 18. That "Hunyadi" might be adopted as a trademark, see *Saxlehner v. Eisner etc. Co.*, 179 U. S. 19, 21 Sup. Ct. Rep. 7.

g. Name of Material, or Article, or Words in Common Use. Material itself, such as tin, wood, paper, leather, or cloth cannot be exclusively appropriated as a trademark. This was so held where a piece of tin was used as a tag for tobacco: *Lorillard v. Pride*, 28 Fed. 434. Neither can the name of a material, such as "Tin Tag," "Paper Tag," etc., be exclusively used: *Lorillard v. Pride*, 28 Fed. 434. In *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, the word "aluminum," as applied to an article

composed partly of that metal, was held could not be monopolized as a trademark. A perfectly new word, however, may be appropriated as a trademark, though through usage the term comes to be the name of the article or material itself. Thus, "Celluloid" was held to be a valid trademark in *Celluloid Mfg. Co. v. Read*, 47 Fed. 712; and *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94. The same rule was applied to the term "aliced animals," in *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169. *Leclanche Battery Co. v. Western Elec. Co.*, 23 Fed. 276, apparently lays down a contrary rule. A word which has been used in a country as the name of an article of food cannot be appropriated as a trademark. Thus, the word "Matzoon," used for centuries in Armenia as the name of an article of diet prepared from sterilized or fermented milk is not a good trademark: *Dadirrian v. Yacubian*, 98 Fed. 872. Words in common use as designating locality, or section of a country, or material, or the article itself, cannot be used as a trademark: *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. Rep. 151. "Tycoon," as applied to tea, is not a good trademark, since the term had been for many years in common use in the trade to designate a particular kind of tea: *Corbin v. Gould*, 133 U. S. 308, 10 Sup. Ct. Rep. 312. "Crystallized Egg," being words in common use, cannot be used as an exclusive trademark; *Lamont v. Leady*, 88 Fed. 72. Words which are commonly used to describe an article or its qualities or characteristics cannot be a good trademark. So held of the words "Selected Shore Mackerel": *Trask Fish Co. v. Wooster*, 28 Mo. App. 408. Words in common use may generally be used as a trademark, if they are arbitrarily used or employed in a fanciful sense to designate the origin or ownership of articles. Their use is only prohibited where they are commonly employed to designate the article or some of its characteristics. But if they have never before been used to designate the same or like articles of production, the fact that they are words in common use does not prevent them from being adopted as an exclusive trademark: See *Canal Co. v. Clark*, 13 Wall. 322; *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. 177, and cases already cited.

h. Names of Publications.—A person may acquire a valid trademark in the name of a publication or the title of a book. Whether this is called a trademark or something else is immaterial, as the nature of the right and the protection accorded is precisely the same. This was pointed out in *Robertson v. Berry & Co.*, 50 Md. 591, 33 Am. Rep. 328, the court saying, among other things: "A publisher or author has either in the title of his work or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trademark, and may, like a trader, claim the protection of a court of equity against such a use or imitation of the name, marks, or designations, as is likely, in the opinion of the

court, to be a cause of damage to him in respect of that property." In this case the publication protected was a yearly almanac known as "J. Gruber's Hagerstown Town and Country Almanack." In *Social Register Assn. v. Howard*, 60 Fed. 270, the words "Social Register," as applied to a quarterly publication of a list of persons resident in a certain locality, compiled with reference to the personal and social standing of such persons, was held to constitute a valid trademark. In the same way the word "Chatterbox," as applied to a publication of a juvenile character, was deemed entitled to protection, the plaintiff having the exclusive right to use such name: *Estes v. Leslie*, 29 Fed. 91; *Estes v. Williams*, 21 Fed. 180. And this was so held in *Estes v. Leslie*, 27 Fed. 22, notwithstanding the defendant distinguished his publication by the prefixing thereto the name "Frank Leslie." In *Munro v. Tousey*, 129 N. Y. 38, 29 N. E. 9, the plaintiff, while entitled to the exclusive use of the phrase "Old Sleuth Library," was held to have no right to appropriate the single word "Sleuth" as a designation for his detective stories.

Where the copyright on a book has expired, anyone is entitled to use the same name in a republication of the work. So held in regard to a reprint of "Webster's Dictionary": *Merriam v. Famous Shoe etc. Co.*, 47 Fed. 411; *Merriam v. Texas Siftings Co.*, 49 Fed. 944. These cases seem to intimate that such a term as "Webster's Dictionary" is not sufficiently arbitrary to be a good trademark in any event.

Whether the name of a publication constitutes a valid trademark or not, one who uses a particular name for his publication may be protected from unfair competition and from the representation of another that his publication is the same. Thus, in the two cases just cited (*Merriam v. Famous Shoe etc. Co.*, 47 Fed. 411, and *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. 944), the complainant, while having no exclusive right to the use of the words "Webster's Dictionary," was held entitled to be protected from the fraud and misrepresentations of the defendants. And in *Matsell v. Flanagan*, 2 Abb. Pr., N. S., 459, the plaintiff, who had long published a newspaper known as "The National Police Gazette," was awarded an injunction to restrain the defendants from continuing the publication of a paper entitled the "United States Police Gazette," which was printed in such a way as to actually deceive the public.

1. **Trade Signs.**—Whether a trade sign is deemed a trademark, strictly speaking, it is clear that one may have a property right in a particular name which indicates to the public where his business is carried on, and his exclusive right to use such name will be protected on principles analogous to those which are applied to cases of the invasion of a trademark: *Glen etc. Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278. In this case the sign used and infringed was "Number 10 South Water Street." In *Howard v.*

Henriques, 3 Sand. 725, in reply to the contention that the name of a hotel could not be the subject of an exclusive appropriation, and that the doctrine of trademarks was applicable alone to personal property, manufactured articles, and to such things as were necessarily movable, the court said: "We think that the principle of the rule is the same, to whatever subject it may be applied, and that a party will be protected in the use of a name which he has appropriated, and by his skill rendered valuable, whether the same is upon articles of personal property which he may manufacture, or applied to a hotel where he has built up a prosperous business." The hotel in this case was named the "Irving House." This case was followed in *Woodward v. Lazar*, 21 Cal. 448, 82 Am. Dec. 751, the court holding that the plaintiff had a valid trademark in the term "What Cheer House," as applied to his hotel. In *Marsh v. Billings*, 7 Cush. 322, 54 Am. Dec. 723, the plaintiffs were given protection in the use of the words "Revere House," as against the false and fraudulent use of such name by the defendants. As further examples of trade signs which have been held entitled to the same protection as trademarks, see *Sanders v. Jacob*, 20 Mo. App. 96, where the plaintiff's sign read "New York Dental Rooms"; *Colton v. Thomas*, 2 Brewst. 308, where the somewhat similar sign of "Colton Dental Association" was protected; and *Gamble v. Stevenson*, 10 Mo. App. 581, where an eating-house was held entitled to the exclusive use of the phrase "What Cheer Restaurant."

Trade signs which are merely descriptive, however, come under the same rule of condemnation as purely descriptive trademarks. Hence the letters "P. B." used upon a sign to denote Philadelphia beer relate only to a description of the beverage dealt in, and cannot be protected as a trademark: *Eggers v. Hink*, 63 Cal. 445, 49 Am. Rep. 96. "Antiquarian Book Store," being words merely indicative of the class of merchandise dealt in, cannot be exclusively appropriated as a trademark: *Choynski v. Cohen*, 39 Cal. 501, 2 Am. Rep. 476. The letters "I X L," used as a sign for an auction company, are nothing but descriptive, and cannot be exclusively appropriated: *Lichtenstein v. Mellis Bros.*, 8 Or. 464, 34 Am. Rep. 592. That trade signs were merely descriptive, and not capable of being exclusively used by anyone, have been applied to the words "Swedish Snuff Store," in *Bolander v. Peterson*, 136 Ill. 215, 26 N. E. 603; "International Banking Company," in *Koehler v. Sanders*, 48 Hun, 48; and "Tower Palace," to describe and designate the building where a clothing business was conducted: *Armstrong v. Kleinhans*, 82 Ky. 303, 56 Am. Rep. 894. The sign must be clearly descriptive, however, in order to deprive a plaintiff of the exclusive right to use it. Hence the term "Nickel Store," applied to a place of business of a general merchant who neither buys nor sells nickel, and whose goods as a rule are not sold for a nickel, is not merely descriptive, and one who employs it as a trade sign

may be protected in his exclusive use thereof: *Duke v. Cleaver & Co.*, 19 Tex. Civ. App. 218, 46 S. W. 1128.

j. Patents and Copyrights.—The general rule is well settled that upon the expiration of a patent, the right to make the patented article and to use the generic name of such article passes to the public, and the manufacturer is not entitled to be protected in the exclusive use of the name as a trademark: See *Gally v. Colt's etc. Mfg. Co.*, 30 Fed. 118, where the term used was "Universal Press"; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002; *Singer Mfg. Co. v. Stanage*, 6 Fed. 279; *Singer Mfg. Co. v. Riley*, 11 Fed. 706; *Singer Mfg. Co. v. Larsen*, 8 Bls. 151, Fed. Cas. No. 12,902; and *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127, 52 Am. Rep. 74, where the use of the word "Singer," as applied to sewing-machines, was involved; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. Rep. 966, denying the exclusive right to use "Best Six Cord" on spools of thread; *Goodyear etc. Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. Rep. 166, where the word "Goodyear" was held to be the name for a well-known class of goods; *Wilcox & Gibbs Sewing-Machine Co. v. Gibbens Frame*, 17 Fed. 623, involving the right to use frames for sewing-machines in the form of the letter "G"; *Hiram Holt Co. v. Wadsworth*, 41 Fed. 34, where the words "Weymouth's Patent" were held not to be a trademark; *Centaur Co. v. Helnsfurter*, 84 Fed. 955, and *Centaur Co. v. Marshall*, 92 Fed. 605, where the word "Castoria" was held to be public property after the patent on the medicine had expired; *Filley v. Child*, 16 Blatchf. 376, Fed. Cas. No. 4787, where the word "Charter Oak," as applied to stoves, was not given protection as a trademark. The same rule applies to the name of any patented article. One cannot, by calling the name of his patent a trademark, protect his monopoly after his patent has expired: *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169; *Burton v. Stratton*, 12 Fed. 696.

Copyrights are subject to the same doctrine: See *Merriam v. Famous Shoe etc. Co.*, 47 Fed. 411, and *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. 944, where the words "Webster's Dictionary" were held to be public property after the expiration of the copyright. And any book not protected by copyright is public property, and may be published under the name of the author, though he has adopted a fanciful name as a nom de plume. The exclusive right to print a book not protected by copyright cannot be acquired by the use of a nom de plume: *The Mark Twain Case*, 14 Fed. 728.

It has been intimated that, where a patent is void and of no force, a manufacturer cannot use the name or device by which his patent is known as a trademark: *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169. The court, however, in *Lorillard v. Wight*, 15 Fed. 383, seems to reach a different conclusion, and holds that where the plaintiff was the first person to adopt and use variously colored tin

tags with their name thereon, and the name of their brand, and fastened upon the outside of plugs of tobacco, they had a right to the device as a trademark, though their patent therefor was declared void. Where the makers of a paint acquired a trademark in this country in the name applied thereto, their right to continue the exclusive use thereof is not affected by the fact that a patent which they had taken out in England on their composition had expired. The name appears to have been used as a trademark before the patent was taken out: *Rathjen's American Comp. Co. v. Holsappel's Comp. Co.*, 101 Fed. 257. A similar doctrine is to be found in *Batcheller v. Thomson*, 93 Fed. 660, where the trademark antedated the patent by more than two years, and the name, and not the patent, gave value to the article, and the court held that in such a case the expiration of the patent did not terminate the exclusive right to use the trademark. Distinctive labels long used by a manufacturer on patented articles do not become free to the public on the expiration of the patent: *Centaur Co. v. Killenberger*, 87 Fed. 725. And while the expiration of a patent gives to the whole world the right to use the patented article and the name by which it is known, yet no one has a right to represent that his goods are actually made by the patentee himself. Such representation tends to, and does, "deceive the public, and the courts will protect the patentee from such unfair and fraudulent competition: See *Frost v. Rindskopf*, 42 Fed. 408, where the patentee was protected in the use of "Warren Hose Supporter," in connection with a cut of a hose supporter and a stocking; *Centaur Co. v. Killenberger*, 87 Fed. 725, and *Centaur Co. v. Neathery*, 91 Fed. 801, where the original manufacturers of "Castoria" were protected in their use of distinctive labels used on their bottles, though the patent on the medicine had expired; and *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002, where new makers of the "Singer" sewing-machine, who had a right to make them after the patent had expired, were required to use distinguishing marks in order not to deceive the public and induce them to believe that they were the original patentees making the machines.

k. Letters.—An arbitrary combination of letters, not used to indicate quality or grade, may, as a general rule, be exclusively appropriated as a trademark: *Shaw Stocking Co. v. Mack*, 12 Fed. 707; *American Leather Button Co. v. Anthony*, 15 R. L. 338, 2 Am. St. Rep. 898, 5 Atl. 626. Thus the letters "G. F.," arbitrarily used in a trademark on velvet ribbons manufactured by the complainants, was protected as against the defendants who used the combination "G. & F.": *Geron v. Gartner*, 47 Fed. 467. In *Foster etc. Co. v. Blood Balm Co.*, 77 Ga. 216, 3 S. E. 284, the plaintiffs were protected in the use of the single letter "B," arranged in three vertical columns separated by lines, so as to form three groups of three "B's." In *Gedillot v. Harris*, 81 N. Y. 263, the plaintiff as part of his trademark used his own initials, "A. G.," inclosed in a

circle. The defendant used his own initials "F. G." in a circle, and otherwise copied the plaintiff's design in its entirety. The plaintiff was given protection. The letters "N. S.," used to designate cigars of a certain style and form of superior and uniform workmanship, were protected as a valid trademark in *Frank v. Sleeper*, 150 Mass. 583, 23 N. E. 213.

Letters, however, which denote quality only, cannot be appropriated as an exclusive trademark. Hence the letters "A. C. A.," used by a manufacturer to designate ticking of a particular quality, was held not to be a valid trademark in *Manufacturing Co. v. Trainer*, 101 U. S. 55, and *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599. The letters "L. L.," used to signify grade or quality are not a good trademark; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396, affirming 31 Fed. 776. Such combinations as "A No. 1," "A X No. 1," "X No. 1," and "B No. 1," used solely to designate size, shape, and quality, are descriptive, and cannot be exclusively appropriated as trademarks: *Candee etc. Co. v. Deere & Co.*, 54 Ill. 439, 5 Am. Rep. 125. The letters "I X L," used as part of a sign over an auction-house are merely descriptive, and do not constitute a valid trademark: *Lichtenstein v. Mellis Bros.*, 8 Or. 464, 34 Am. Rep. 592. Letters such as "A," "B," and "C," used for no other purpose than to conveniently designate the size, shape, and capacity of an article, and to distinguish it from other sizes and shapes, and with no intention or expectation of indicating origin or ownership, are not a good trademark: *Deering Harvester Co. v. Witman etc. Mfg. Co.*, 91 Fed. 376. There is no exclusive right to use letters which merely indicate the appropriate name, mode, or process of manufacture, or the peculiar or relative quality of the fabric or article manufactured, as distinguished from marks or letters which indicate the origin or ownership of the manufactured article: *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599. Although a party may have no exclusive right to the use of letters as a trademark, yet if there is such false representation on the part of a defendant in the use of letters as is calculated to deceive the public and lead it to believe that they are dealing with and buying the wares of the plaintiff, the plaintiff may have protection on the ground of fraud and unfair competition: *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396; *Avery & Sons v. Meikle & Co.*, 81 Ky. 73.

1. **Numerals.**—An arbitrary combination of numbers selected to denote the origin or ownership of goods, and not their grade or quality, may constitute a valid trademark. Thus, the number "830," used in connection with a peculiar design to designate the plaintiff's goods, will be protected as a valid trademark: *Shaw Stocking Co. v. Mack*, 12 Fed. 707. In *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270, the number "2340," used

In connection with the manufacturer's name to designate his make of spoons, was held to form an important part of his trademark which could not be infringed. Similarly, in *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401, the combination "1847, Rogers Bros. A 1," was held to be a valid trademark. In *Humphreys' etc. Medicine Co. v. Wenz*, 14 Fed. 250, while the words "Homeopathic Specifics," standing alone, were held to be no trademark, yet when used in connection with serial numbers ranging from 1 to 35, representing medicines for certain ailments, the medicines coming to be known by their number, they were deemed to be a valid trademark. But in *Humphreys' Homeopathic Medicine Co. v. Hilton*, 60 Fed. 756, the mere numbers themselves were denied protection as a trademark, where the public was not misled by the defendant's use of the same numbers. The number "523" printed in large type underneath the name of the manufacturer above which was an eagle, used to designate hosiery made by the plaintiff, and having no reference to quality, was held to be a good trademark in *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 37 Am. Rep. 362. The numbers "2," "101," and "32," arbitrarily selected to distinguish different patterns of rubber combs made by the plaintiff, the goods being known by such numbers, are a good trademark: *India Rubber Co. v. Rubber Comb etc. Co.*, 13 Jones & S. 258. So the number "303," selected to distinguish a particular pattern of pen made by Joseph Gillott, the pens being known and ordered by such number, is a good trademark when used in connection with the name of the maker: *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553. The words "Number 10," used in connection with the name of a street to designate the plaintiff's place of business, were held entitled to protection upon principles analogous to those applied in cases of trademarks, in *Glen etc. Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278. In *Gillott v. Kettle*, 3 Duer, 624, the plaintiff was protected from the fraudulent use of the number "303" by the defendant. The number "35," adopted to designate cards used for photographic mounts, and known and ordered by such number is a good trademark, though not used in connection with the manufacturer's name or other words to signify origin or ownership: *Collins v. Reynolds Card Mfg. Co.*, 7 Abb. N. C. 17. In *Hazard v. Caswell*, 57 How. Pr. 1, the plaintiff was protected in his right to use as a trademark the words "Established 1870." The number "½," used in a particular form, size, color, and style may be a good trademark, though the mere use of such a number to indicate that cigarettes are composed of two kinds of tobacco, in the proportion of half and half, may not be good: *Kinney v. Allen*, 1 Hughes, 106, Fed. Cas. No. 7826.

Figures which are used to denote quality only cannot be exclusively appropriated as a trademark: *Manufacturing Co. v. Trainer*, 101 U. S. 51. The use of such numbers and letters as "A No.

1," "A X No. 1," "No. 1," "X No. 1," "No. 3," and "B No. 1," for the sole purpose of designating the size, shape, and quality of different plows made by the plaintiff, do not constitute a good trademark: *Candee etc. Co. v. Deere & Co.*, 54 Ill. 439, 5 Am. Rep. 125. Where numbers or letters are originally used to indicate quality, the fact that they subsequently come to designate the origin or ownership of the goods will not change them into a valid trademark: *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396; *Candee etc. Co. v. Deere & Co.*, 54 Ill. 439, 5 Am. Rep. 125.

m. Color.—The mere color of a label, apart from a name, or device, or other distinguishing mark, cannot be the subject of a trademark: *Fleischmann v. Starkey*, 25 Fed. 127; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. Rep. 966; *Mumm v. Kirk*, 40 Fed. 589; *Ball v. Siegel*, 116 Ill. 137, 56 Am. Rep. 767, 4 N. E. 667; *Morgan's Sons Co. v. Troxell*, 89 N. Y. 292, 42 Am. Rep. 294; *Faber v. Faber*, 49 Barb. 357; *Sawyer v. Horn*, 4 Hughes, 239, 1 Fed. 24; *Fleischmann v. Newman*, 51 Hun, 641, 4 N. Y. Supp. 642; *Babbitt v. Brown*, 68 Hun, 515, 23 N. Y. Supp. 25; *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205, 23 Am. St. Rep. 228, 21 Atl. 391. Where, however, color is combined with form, words and devices in such a way as to give the appearance of an arbitrary design, the color constitutes part of the trademark, and its use will be protected as against one who is deceiving the public and inducing them to believe that his goods are those of the plaintiff: *New York Cab Co. v. Mooney*, 15 Abb. N. C. 152. In this case the plaintiff painted the lower body of its cabs yellow, and upon the upper panel painted a crown with three feathers issuing out of it, and encircled by a gold band with plaintiff's name thereon. The defendant painted his cabs so similarly as to mislead the public. In *Lea v. Wolf*, 13 Abb. Pr., N. S., 389, the color of the paper, the words used, and the general appearance of the labels showed an evident intention of making his labels represent those of the plaintiff, and this was deemed an infringement of the plaintiff's trademark. In *Fischer v. Blank*, 19 N. Y. Supp. 65, 64 Hun, 635, the plaintiffs adopted a wrapper of a certain size, shape, and color for their tea, which was called "Black Package Tea," and the defendant was enjoined from using a wrapper of the same size, shape, and color to designate the same article, and also containing a similar grouping of symbols, so as to actually mislead purchasers. The judgment in this case was modified on appeal in *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040, but was affirmed in its general principles. In *Williams v. Johnson*, 2 Bosw. 1, the plaintiff had adopted a particular form and size of cake for his soap, and a particular mode of covering and packing it, including the color of the package and the designs thereon. He was held entitled to its exclusive use as against a fraudulent imitation. Every dealer is entitled to be

protected from fraud and unfair competition; hence one who has adopted as a trademark a label of a particular size, form, color, words, and symbols, will be protected in his use thereof as against one who has so closely imitated it as to actually mislead and deceive the public: *Lockwood v. Bostwick*, 2 Daly, 521. No one should be allowed to sell his goods as those of another, nor to so label them as to induce purchasers to believe that they are the goods of another. Whether a plaintiff has a trademark or not, he will be protected when it is apparent that there is an imitation of his label, whether as to color, shape, or inscription, which imitation is calculated and intended to deceive the general public: *Morgan's Sons Co. v. Schwachhofer*, 55 How. Pr. 37; *Sawyer v. Horn*, 4 Hughes, 239, 1 Fed. 24.

n. Form of Article or Package.—Under ordinary circumstances, the adoption of packages of a peculiar form and color alone, without any other distinguishing marks, is not sufficient to constitute a trademark. The general rule is well settled that there can be no trademark in the mere form of an article or package: See *Fischer v. Blank*, 138 N. Y. 244, 83 N. E. 1040; *Hoyt v. Hoyt*, 143 Pa. St. 623, 24 Am. St. Rep. 575, 22 Atl. 755; *Ellis v. Zellin & Co.*, 42 Ga. 91; *Ball v. Siegel*, 116 Ill. 137, 56 Am. Rep. 767, 4 N. E. 667; *Evans v. Von Laer*, 32 Fed. 153; *Clinton etc. Paint Co. v. New York etc. Paint Co.*, 23 Misc. Rep. 66, 50 N. Y. Supp. 437.

The mere size, shape, or mode of construction of a box, barrel, bottle, or package, in which goods are put up for transportation or sale cannot be protected as a trademark, since there is nothing in this to distinguish the goods to which it is applied: *Hoyt v. Hoyt*, 143 Pa. St. 623, 24 Am. St. Rep. 575, 22 Atl. 755. Under this rule the following have been held not subject to protection as trademarks: The size and form of bottles containing lime fruit juice: *Evans v. Von Laer*, 32 Fed. 153. The form of a tobacco box containing a preparation designed to cure the tobacco habit: *Sterling Remedy Co. v. Eureka etc. Mfg. Co.*, 80 Fed. 105. The form or shape of a sewing-machine frame: *Wilcox & Gibbs Sewing-Machine Co. v. Gibbens Frame*, 17 Fed. 623. Peculiar method of arranging soap in a box: *Davis v. Davis*, 27 Fed. 490. The form and size of a book: *Merriam v. Famous Shoe etc. Co.*, 47 Fed. 411. The form of sticks of gum, nor the shape of boxes in which it is put upon the market, nor the particular manner in which it is arranged in the boxes: *Adams v. Heisel*, 31 Fed. 279. The use of a diamond-shaped figure gives no trademark in the word "Diamond": *Pittsburgh Crushed Steel Co. v. Diamond Steel Co.*, 85 Fed. 637; and see *Kann v. Diamond Steel Co.*, 89 Fed. 706.

Actual barrels, boxes, bottles, and the like are not the subjects of a trademark for their particular size, style, or shape. But this has reference solely to the physical objects themselves and their form, and not to pictures or devices of them for labels: *Clinton etc.*

Paint Co. v. New York etc. Paint Co., 23 Misc. Rep. 66, 50 N. Y. Supp. 437. Thus, in *Morgan's Sons Co. v. Troxell*, 89 N. Y. 292, 42 Am. Rep. 294, it was said that a mere idea represented by some figure—as, for example, that the article will make things bright enough to be used as mirrors—cannot be appropriated as a trademark, though a picture or figure by which the idea is sought to be conveyed may be adopted. Of similar effect is the opinion in *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040.

While one cannot acquire a trademark merely in the particular form or shape of an article or package, yet a particular shape may be so connected with the size of a package, and with labels and other devices thereon, including a name to represent its contents, that the whole may be a good trademark, though any one of such features might be used by another: See *Cook v. Starkweather*, 13 Abb. Pr., N. S., 392; *Alexander Bros. v. Morse*, 14 R. L. 153, 51 Am. Rep. 369. In this last case the plaintiff made and sold medicine as “Morse’s Syrup of Yellow Dock Root,” put up in bottles of a particular size and shape. The defendant sold medicine in bottles having the words “Dr. Morse’s Celebrated Syrup,” blown in the glass, and resembling perfectly the plaintiff’s bottles in size and shape. The plaintiff was held entitled to protection. The rule in such a case was well stated by the court in *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040, where the article copied was a package of tea, known as “Black Package Tea,” of a peculiar size and shape, and having particular distinguishing marks thereon. “It must be admitted,” said the court, “that there is no single point of resemblance or imitation, which would of itself be regarded as adequate grounds for the grant of equitable relief. Form alone would not be sufficient, nor size, nor color, nor the general decoration of the panels, nor disks of the same size and color arranged in the same way, nor a label of the same shape and color attached to the same part, nor the use of the same name to designate the kind or quality of tea. Each one of these distinguishing features might be separately used and no harm result. But when all, or a number of them, are combined in a single package, and so arranged and exhibited that when they strike the eye of the intending purchaser, possessed of ordinary intelligence and judgment, the false impression is likely to be produced that the goods of the plaintiff are offered, it is the province of equity to interfere for the protection of the purchasing public as well as of the plaintiffs, and for the suppression of unfair and dishonest competition.”

Even where no trademark has been or can be acquired by a manufacturer or dealer, yet no one has a right to make and sell his own goods as those of another, and where one dealer has adopted a package of peculiar shape and design to distinguish his goods, he will be protected in its use from such imitation thereof in color, design, style, and lettering, as will deceive the public into believing that they are actually buying his goods: See *Carbolic*

Soap Co. v. Thompson, 25 Fed. 625; Wilcox & Gibbs Sewing-Machine Co. v. Gibbens Frame, 17 Fed. 623; Moxie Nerve Food Co. v. Baumbach, 32 Fed. 205; Cook v. Starkweather, 13 Abb. Pr., N. S., 392; Frese & Co. v. Bachof, 14 Blatchf. 432, Fed. Cas. No. 5110. Consult Morgan's Sons Co. v. Troxell, 89 N. Y. 292, 42 Am. Rep. 294. Under this rule it is not necessary that an actual valid trademark should have been infringed: McLean v. Fleming, 96 U. S. 245. It is sufficient if a manufacturer puts up his goods in peculiarly shaped and labeled packages, so that the goods are known to purchasers by such packages and labels; then no other dealer of similar goods has a right to use packages and labels so similar to them as to deceive the public into the belief that the goods are those of the first manufacturer: Sawyer v. Horn, 4 Hughes, 239, 1 Fed. 24. No inflexible rule can be laid down, but each case must depend upon its own facts and in a measure be a law unto itself. The general test is, as stated in Fischer v. Blank, 138 N. Y. 244, 33 N. E. 1040, "whether the resemblance is such that it is calculated to deceive, and does in fact deceive, the ordinary buyer making his purchases under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates": See, also, McLean v. Fleming, 96 U. S. 245.

c. **Devices and Symbols.**—A symbol or device, not previously appropriated, which will distinguish the products of one manufacturer or dealer from articles of the same kind made by another, may be adopted as a trademark, and the one so adopting it will be protected in its exclusive use: Manufacturing Co. v. Trainer, 101 U. S. 51. Probably a mere design, with no words or letters thereon to distinguish it, will not be a good trademark, especially where the design is a simple one, as a letter or a horseshoe: Lorillard v. Drummond Tobacco Co., 14 Fed. 111. But even a simple device in connection with words may be a valid trademark. Thus, the symbol of a star in combination with the words "Star Shirts" and other words describing the articles, so that the goods came to be known by such mark, and were designated as star goods, constitute a good trademark: Hutchinson v. Blumberg, 51 Fed. 829. The head of an elk, with the word "Elk," printed on the face of the label, and the words "Patented by the Elk Cigar Factory, June 15, 1875," is a valid trademark: Lichtenstein v. Goldsmith, 37 Fed. 359. The following designs have also been protected as good trademarks: The cut of an Indian against a background of spruce trees and a waterfall, and the words "Syrup of Red Spruce Gum," to designate a medicine: Kerry v. Toupin, 60 Fed. 272. A cut of a hose supporter engaged with a stocking, coupled with the words "Warren Hose Supporter": Fröst v. Rindskopf, 42 Fed. 408. The figure of a boy in a position indicating suffering from cramps, beneath which were the words "Cramp Cure," though in this case the words "Cramp Cure" were held to be no part of the trademark: Harris Drug Co. v. Stucky, 46 Fed. 624. Tin red tags variously

colored, with the name of the brand of tobacco and the name of the manufacturer stamped thereon: *Lorillard v. Wight*, 15 Fed. 383. An eagle with outstretched wings, perched on a mortar in which rested a pestle, to represent medicines, the manufacturer's name being on the label: *Hegeman & Co. v. O'Byrne*, 9 Daly, 264. A barrel with a red rim upon the head, and a glazed surface on the head, with the letters "A A A" and a maltese cross thereon, and the words "Old Valley Whisky": *Cook v. Starkweather*, 13 Abb. Pr., N. S., 892. A device consisting of a letter of the alphabet ("B") repeated nine times, and arranged in three vertical columns separated by lines, so as to form three groups of three "B's," the label also containing the name of the medicine and the name and address of the maker: *Foster etc. Co. v. Blood Balm Co.*, 77 Ga. 216, 8 S. E. 284.

Whether there is a real trademark or not, a person may be protected in the use of a device, upon the principle, so frequently noticed heretofore, that courts of equity will interfere to prevent illegitimate competition by one who seeks to draw to himself the custom of another by a false and fraudulent use of symbols or devices used by, and which are known to be used by, such other person. Hence, a real estate auctioneer who, in connection with his advertisement, uses a representation of a flag with stars on the upper and lower borders, will be protected against the use of a similar design by another real estate auctioneer: *Johnson v. Hitchcock*, 3 N. Y. Supp. 680.

Pictures in a book, used as frontispiece illustrations only, are not trademarks, though a particular character appears in the frontispiece illustration in each book, where the picture is different in each book, the whole design being changed with the requirements of each story: *Munro v. Smith*, 55 Hun, 419, 8 N. Y. Supp. 671. An article itself, such as a tin pail used to contain paper collars for sale, cannot be claimed as a trademark, though it may be ornamented with designs: *Harrington v. Libby*, 14 Blatchf. 128, Fed. Cas. No. 6107. An idea itself shown by a design, such as that the article sold (soap) will make things bright enough to be used as mirrors, cannot be appropriated as a trademark: *Morgan's Sons Co. v. Troxell*, 89 N. Y. 292, 42 Am. Rep. 294. A picture which is purely and unmistakably descriptive can probably be no more used as a trademark than any other design or words that are merely descriptive, and which might be used with equal truth by anyone making or selling the same article. In *Popham v. Cole*, 66 N. Y. 69, 23 Am. Rep. 22, it was deemed a matter of doubt whether a manufacturer of lard could use the picture of a hog as a trademark. If, as the opinion suggests, such a picture has been used indiscriminately by many dealers in lard, obviously it could not be appropriated as a trademark. Otherwise we question the soundness of the remarks in this case. Certainly, the picture of a hog no more represents merely lard than it does ham, or pickled

pigs' feet, or tanned pig-skin, or perhaps many other articles of commerce. Such cases have been the subject of considerable criticism in the English courts: See *In re James' Trademark*, L. R. 33 Ch. Div. 392. In *Falkenburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76, it was doubted whether the picture of a washing room, with tubs, baskets, clothes lines, etc., could be regarded as a trademark for a washing powder. But as already seen the picture of a boy in a position indicating that he was suffering from cramps was held to be the subject of a good trademark: *Harris Drug Co. v. Stucky*, 46 Fed. 624. A device connected with a patent is not a good trademark after the expiration of the patent: *Wilcox & Gibbs Sewing-Machine Co. v. Gibbens Frame*, 17 Fed. 623.

TUSCALOOSA ICE MANUFACTURING COMPANY v. WILLIAMS.

[127 Ala. 110, 28 South. 669.]

CONTRACTS IN RESTRAINT OF TRADE—WHEN VALID. Contracts in partial restraint of trade which the law sustains are those entered into by a vendor of a business with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. (p. 130.)

RESTRAINT OF TRADE—UNREASONABLE.—THE MERE COVENANT on the part of a manufacturer not to continue his business, the sole consideration being the payment of money for the obligation itself, the business not being sold, is unreasonable and vicious as being in restraint of trade, since neither its purpose nor effect is to protect the covenantee in the enjoyment of a business which he has purchased. (pp. 130, 131.)

RESTRAINT OF TRADE—MONOPOLY—VOID CONTRACT. An agreement, the obvious purpose and necessary effect of which is to stifle competition and create a monopoly, is void. (p. 132.)

MONOPOLY—CONTRACT—EFFECT OF IMPORTATIONS. A covenant tending to create a monopoly in a given city is not relieved by the consideration that its baneful effects may be counteracted in a greater or less degree by importations. (p. 132.)

MONOPOLY—PUBLIC POLICY—NECESSARIES OF LIFE. A contract which creates a monopoly in any article of common or even considerable utility or consumption is against public policy, whether it is a necessary of life or not. (p. 133.)

MONOPOLY—NECESSARIES—ICE.—At least in populous communities in a warm climate, ice is one of the common necessities of life. (p. 133.)

Fitts & Fitts, for the appellant.

Foster & Oliver, contra.

¹¹⁴ McCLELLAN, C. J. B. H. Williams is plaintiff, and the Tuscaloosa Ice Manufacturing Company is defendant in this action. The complaint is as follows: "The plaintiff claims of the defendant the sum of three hundred and twenty-five dollars with interest from the first day of September, 1898, as damages for the breach of a contract or agreement entered into between the plaintiff and defendant on, to wit, the first day of January, 1898, in substance as follows: This agreement made and entered into between the Tuscaloosa Ice Manufacturing Company, of which Henry B. Gray is president, of the first part, and B. H. Williams, sole owner of an ice machine located near the Alabama Great Southern Railroad depot, at Tuscaloosa, Alabama, of the second part, witnesseth that the party of the first part, for and in consideration of the covenants of the party of the second part hereinafter mentioned, agrees to pay the party of the second part the sum of eight hundred and seventy-five dollars (\$875) in five equal payments of one hundred and seventy-five dollars each (\$175), the first payment to be made this day, and the other four payments on the first day of June, 1898, 1899, 1900, 1901, respectively. In consideration of the promise of the foregoing payments the party of the second part hereby agrees not to run his ice machine as described above, nor suffer it to be run for the term of five years at Tuscaloosa, Alabama, unless the party of the second part shall make a sale of the same to be run at Tuscaloosa, Alabama, in which event he releases the party of the first part from making all subsequent payments to him; and also agrees to refund on any payment made by [to] him during the year such sale is made such a part of said payment as the remainder of that year bears to the entire year. It is further agreed that if the said party of the second part shall sell his ice plant between January 1st and June 1st of any year, he shall be entitled to his proportional payment for that year. It is further ¹¹⁵ agreed that in case some unknown party should erect, or operate, an ice machine in the city of Tuscaloosa, Alabama, or in the vicinity of said city of Tuscaloosa, that the party of the second part known in contract as B. H. Williams, shall release all subsequent payments to the party of the first part, at the time of the erection of an ice plant to compete with said first party, provided that the sum of five hundred dollars shall have been paid to the party of the second part. It is further agreed that if said plant or opposition should disturb the party of the first part before the amount of five hundred dollars is paid to the party of the second part, that the party of the first part shall only pay to the party of the sec-

ond part the difference between the total payments made and the five hundred dollars; and should said ice plant be erected after five hundred dollars had been paid to the party of the second part, no other payments will be required. And plaintiff says that, although he has complied with all its provisions on his part, and has not sold his said ice machine to be operated at or in the vicinity of Tuscaloosa, the defendant has failed to comply with its provisions on its part in the particulars following, viz.: Some time during the summer of 1898, to wit, in July or August, the Tuscaloosa Gas, Electric Light and Power Company, a corporation having its office and principal place of business at Tuscaloosa, Alabama, amended its corporate charter, changing its name to 'The Tuscaloosa Light and Ice Company,' and having conferred upon it the power to manufacture and sell ice at Tuscaloosa, Alabama, and erected an ice plant and began the manufacture of ice at Tuscaloosa, and although the defendant had at the time of the establishment of said Tuscaloosa Light and Ice Company's ice plant at Tuscaloosa, only paid to plaintiff the first payment of one hundred and seventy-five dollars mentioned in said contract as paid on the day of its execution, it has wholly failed and refused to pay plaintiff the difference between said payment of one hundred and seventy-five dollars and five hundred dollars, as it agreed in said contract to do in the event of the erection of an opposition ice plant; hence this suit."

To this complaint the defendant interposed the following plea: "At the time said contract was entered ¹¹⁶ into, the plaintiff owned and operated the only ice factory in Tuscaloosa or its vicinity, and the only factory which was then selling ice to the people of Tuscaloosa and immediately surrounding territory, other than defendant's factory. Said population, consisting of, to wit, seven thousand people, was drawing its whole supply from and was dependent upon said two ice factories for the same, and the demand for ice in said community was sufficient to consume and render marketable the output of both of said factories. Prior to said contract the price of this article of necessity and comfort was lessened to said community of consumers by competition between these two said ice factories. The object and effect of said contract was to wholly discontinue the manufacture of ice by plaintiff, to close down plaintiff's factory, to end all competition with defendant's ice trade, to leave defendant's plant the sole source of ice supply for said community, and to give to defendant the complete control and monopoly of said ice market, enabling it to increase the

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price thereof regardless of the cost of its manufacture. Wherefore, said contract was one concerning said ice market, stifling competition, creating monopoly, closing down heretofore active manufacture, and hence the same is void as in restraint of trade and against public policy." The trial court sustained a demurrer to the plea, defendant declined to plead over and judgment was entered for plaintiff. The present appeal from that judgment presents the question of whether the contract sued on, considered in connection with the facts averred in the plea, involves a vicious restraint of trade and is therefore violative of the public policy of the state, and void.

The argument in support of the contract is largely based upon the consideration that the restraint it imposes is limited both as to time and to territory—to five years at the most and to the town of Tuscaloosa and its vicinity, and many cases have been determined upon these considerations alone. But they were so determined, or at least at the present day they could be so determined, only because the contracts involved in them were unobjectionable upon other grounds. As the principles ¹¹⁷ obtaining here are understood in their application to existing conditions of traffic and commerce, we apprehend that circumstances in respect of a particular business might exist under which a covenant engaging in it covering all time and the whole country would be upheld by the courts. All such covenants are for the protection of the business of the covenantee; and the logical rule would seem to be that their scope may be as broad as to time and territory as the business intended to be protected. It is upon this principle that contracts not to engage at any time in particular businesses in the United Kingdom or in the United States, or even in Great Britain and Holland, or in the United States and Canada have been held valid, the business in each instance being coextensive with the territory embraced in the covenant, and of probable indefinite continuance. And, on the other hand, the same principle is potent to the conclusion that such covenant having reference to a particular county or even town only, and confined to a year or other definite time, may be void in whole or in part for being broader as to time or place than the business designated to be protected by it, as where the business extends only to a part of the county or town, or must cease short of the time of the covenant. But, however extended or circumscribed the business may be, however broad or narrow may be the covenant in respect of time and place, and however exactly the covenant may respond in time and place to exigencies of the business, the contract may

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yet fall under the ban of public policy and call for condemnation by the courts upon other and distinct considerations growing out, it would seem, of the nature of the transaction upon which it is based, or looking to the protection of the public from the strangulation of legitimate and necessary competition.

One of these considerations, that resting on the nature of the transaction in which the covenant not to engage in a particular business is made, is this: Leaving to one side and out of view those cases in which property is sold and as part of the consideration the vendee agrees not to employ it in a business being carried on by the vendor, or within the territory covered by the vendor's business, and that other class of cases in which ¹¹⁸ an employé covenants with his employer not to engage in the business about which he is employed on his own account or for another after the termination of his employment, and that yet other class of cases involving secret or patented processes, or patented devices and instrumentalities, it seems that the only cases, apart as we have indicated from those just mentioned, in which there can be any legitimate occasion for a covenant on the part of one not to engage in the business proposed to be carried on by another, are those in which the covenantor has sold to the covenantee his stock in trade, as in the case of a merchant, or his part of it, as where one mercantile partner sells out to the other or to a stranger, or, being a professional man with an established practice, as a physician, dentist, and the like, or mechanic with a shop and accustomed patronage, as a blacksmith and the like, or, if he be a manufacturer, sells out his practice or business or plant, with or without an express stipulation as to its goodwill, and in the same transaction and as part of the thing sold, and as in part the consideration for the price paid, agrees not to engage in that business, profession, or trade, as the case may be, within the territory covered or supplied by the business, practice, or factory purchased during the time the vendee shall be interested therein. In line with this view it is said by Mr. Beach: "The modern doctrine is well-nigh universal that when one engaged in any business or occupation sells out his stock in trade and goodwill or his professional practice, he may contract with the purchaser and bind himself not to engage in the same vocation in the same locality for a time named, and he may be enjoined from violating this contract. This is about as far as contracts in restraint of trade have been upheld by the American courts or those of England. While the law, to a certain extent, tolerates contracts in restraint of trade or business when made between vendor and purchaser,

and will uphold them, it does not treat them with any special indulgence. They are intended to secure the purchaser of the goodwill of a trade or business a guaranty against the competition of the former proprietor. When this object is accomplished ¹¹⁹ it will not be presumed that more was intended": 2 Beach on Contracts, sec. 1575. And to the same effect is the declaration of the supreme court of Illinois in *More v. Bennett*, 140 Ill. 69, 80, 33 Am. St. Rep. 216, 29 N. E. 891: "Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its goodwill with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased"; and this language is quoted approvingly by the supreme court of Pennsylvania: *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 41 Am. St. Rep. 894, 29 Atl. 104. The supreme court of Iowa adopts the same view (*Chapin v. Brown*, 83 Iowa, 156, 32 Am. St. Rep. 297, 48 N. W. 1074), and so have other courts where this phase of the general question has been discussed: *Oliver v. Gilmore*, 52 Fed. 562. There are several reasons for upholding the covenant on the part of the vendor in all such cases to desist from the business in competition with the purchaser which do not obtain in other cases. In the first place, the restraint is partial in the sense that it covers only the time and locality during and in which the vendee carries on the business purchased, and beyond these limitations the seller is at liberty to carry on the same business. Then, too, the vendor receives an equivalent for his partial abstention from that business in the increased price paid him for it on account of his covenant; and his entering into and observance of the covenant not only does not tend to his pauperization to the detriment of the public, but, to the contrary, by securing to him the full value of his business and its goodwill, a value which he has an absolute right to secure in this way, the covenant operates to his affirmative pecuniary benefit and against his impoverishment, involving, the theory is, imminency of his becoming a public charge or a criminal, in that, while being paid for desisting from the particular business in the locality covered by it, he may still enter upon other pursuits of gain in the same locality or upon this one in other localities. And finally, while such covenants preclude the competition of the covenantor, it is ¹²⁰ neither their pur-

pose nor effect to stifle competition generally in the locality, nor to prevent it at all in a way or to an extent injurious to the public, for the business in the hands of the purchaser is carried on just as it was in the hands of the vendor, the former merely takes the place of the latter, the commodities of the trade are as open to the public as they were before, the same competition exists as existed before, there is the same employment furnished to others after as before, the profits of the business go as they did before to swell the sum of public wealth, the public has the same opportunities of purchasing, if it be a trading business, they are served in the same way, if it be a profession, and production is not lessened if it be a manufacturing plant. As said by Putnam, circuit judge, in *Oliver v. Gilmore*, 52 Fed. 568: "When the covenantor surrenders his trade or profession, an equivalent is given to the public, because, ordinarily, as a part of the transaction, the covenantee assumes and carries on the trade or profession, nothing is abandoned, and only a transfer is accomplished. The same occupation continues, the same number of mouths are fed." And these considerations obtain where one already engaged in a business in good faith for the purpose of enlarging and increasing his business purchases the stock in trade or practice, or plant of a rival, and incident thereto takes the covenant of the seller not to engage in the same business within the territory covered by the consolidated enterprise, and in all such cases the covenant in restraint of trade is a reasonable one and valid. But there is no room for the application of these reasons to cases in which the covenantee does not purchase the business, practice, trade, or plant of the covenantor, and the transaction involves nothing but a bald covenant in restraint of trade for which there is no other consideration than the payment of money for the obligation itself. In such cases the business of the covenantor is not transferred merely; it is destroyed. His plant is not continued by the covenantee in useful production, but is left to rust and canker in disuse. The public loses a wealth-producing instrumentality. Labor is thrown ¹²¹ out of employment; "the same number of mouths" are not fed. The consideration the covenantor receives is not the just reward for his skill and energy and enterprise in building up a business, but is a mere bribery and seduction of his industry and a pensioning of idleness. The motives actuating such a transaction are always in a sense sinister and baleful. Its purpose and effect are not to protect the covenantee in the legitimate use of something he has acquired from the covenantor, but to secure to him the illegitimate use or the use in

an illegitimate way of that which he already has, in respect of which there is no reason or occasion for the covenantor to assume any obligation of protection. Such an undertaking in restraint of trade, however limited as to time and place, would seem, upon all general principles, though we know of no case expressly and directly so deciding, to be necessarily unreasonable and vicious on the consideration alone that it is not entered into, nor has it the effect of protecting some business, practice, trade, or interest which the covenantor has sold to the covenantee. The undertaking involved in this case is precisely of that class, and must fail upon the principle we have been discussing.

But this contract is clearly bad upon the other consideration adverted to above: It tends to injure the public by stifling competition and creating a monopoly. Its manifest purposes, even upon its face, and certainly when taken in connection with the facts averred in the plea, was to secure to the covenantee a monopoly in the production and sale of ice in the town of Tuscaloosa and vicinity, and such is its operation and effect. Indeed, on the allegations of the plea it was even worse than this, for one of its results was to reduce the available supply of ice below the needs of the locality affected by it. It thus operated not only to put it in the power of the covenantee to arbitrarily fix prices, but directly and necessarily to create a partial ice famine, upon which the defendant company could batten and fatten at its own sweet will. But aside from this, the monopoly itself, the putting in the power of the covenantee to control the production and to fix its own prices, whatever the production, is quite sufficient for the utter condemnation ¹²² of the contract as being against public policy. The purpose to create a monopoly is obvious; it is well-nigh expressed in the writing itself. That a monopoly was created is clear beyond all dispute. That ends the case against the validity of the covenant. Nothing more need be said. All that has been said for the appellee against that conclusion is vain and useless. Given the purpose and effect of this contract, its condemnation would follow, even had the plaintiff as a part of the transaction sold his ice plant to the defendant; and the limitation of the covenant as to time and place, though reasonable in itself, is of no redeeming importance or efficacy whatever. So of the suggestion that no monopoly was created because the contract itself evidences a contemplation that "unknown parties" might come to Tuscaloosa, establish an ice factory and enter upon the production and sale of ice in competition with the covenantee. There was no other such plant there at the time the contract was entered

into (it would not have been entered into at all had there been), and it is of no sort of consequence that another might be established, or even that another was in fact established soon after its execution, as soon, probably, as one could be established after defendant's monopoly began to grind. Nor is there the least merit in the suggestion that ice could be brought to Tuscaloosa from other places, and hence that defendant had no monopoly. Even with ordinary commodities a covenant tending to create a monopoly in a given city or to unduly control prices is not relieved by the consideration that its baneful effects may be counteracted in greater or less degree by importations; and the position is exceedingly nude and bald when taken in respect of a commodity like ice or water, the chief cost of which, apart from the plant for its manufacture or collection, is in the transportation to the consumer; and it may be safely said that an ice factory in a town beyond the ordinary reach of delivery wagons from another town has a monopoly of the ice business in that town. And so of the argument that public policy has to do in this connection only with the necessities of life, and that ice is not a ¹²³ commodity of that class. Both the propositions thus asserted—the one of law, the other of fact—are unsound. To say the least, it is against public policy to monopolize in this way any commodity of common utility, or of common consumption or use among the people, or even of considerable utility or consumption, whether it be one of the necessities of life or not; and, in the second place, we feel entirely assured of conservatism in declaring that in this latitude, and especially in towns as populous as Tuscaloosa, ice is one of the common necessities of life. All of the foregoing propositions, sustaining the conclusion that the contract sued on is violative of public policy as stifling competition and promoting monopoly to the manifest injury of the public, are fully supported by the following authorities: 2 Beach on Modern Law of Contracts, secs. 1579, 1592; Clark on Contracts, 458 et seq.; Craft v. McConoughby, 79 Ill. 346, 22 Am. Rep. 171; Arnet v. Pittston etc. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; More v. Bennet, 140 Ill. 69, 33 Am. St. Rep. 216, 29 N. E. 888; Santa Clara etc. Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 291; Hooker v. Vandewater, 4 Denio, 349, 47 Am. Dec. 258; Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; India Bagging Assn. v. Kock, 14 La. Ann. 164; Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 29 Am. St. Rep. 690, 19 S. W. 274; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; Chapin v. Brown, 83 Iowa, 156, 32 Am. St. Rep. 297, 48 N. W. 1074; Oliver v. Gil-

more, 52 Fed. 562; *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 41 Am. St. Rep. 894, 29 Atl. 104; *Anderson v. Jett*, 89 Ky. 376, 12 S. W. 670.

It follows that in our opinion the court below erred in sustaining the demurrer to defendant's plea. The judgment of the law and equity court will be reversed, and a judgment will be here entered overruling said demurrer. The cause will be remanded.

A Contract in Partial Restraint of Trade may be upheld when the restriction does not go beyond some particular locality, is founded upon a sufficient consideration, and is limited as to time, place, and person: *Chapin v. Brown*, 83 Iowa, 156, 32 Am. St. Rep. 297, 48 N. W. 1074. See, also, the extended note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 238; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723; *Lanzit v. Sefton Mfg. Co.*, 184 Ill. 326, 75 Am. St. Rep. 171, 56 N. E. 393; *Saddlery etc. Co. v. Hillsborough Mills*, 68 N. H. 216, 73 Am. St. Rep. 569, 44 Atl. 300. The limitation as to space must not be greater than the due protection of the party for whose benefit the contract is made demands: *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380.

Trusts and Monopolies.—What is a necessity of life within the meaning of illegal trade combinations is considered in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 268-271. The fact that a trust does not necessarily prove injurious to the public is generally held to be no defense to its invalidity: Note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 271, 272.

BROWN v. JOHNSON.

[127 Ala. 292, 28 South. 579.]

NEGOTIABLE INSTRUMENTS — ALTERATION — DISCHARGE OF MAKER.—Any material alteration of a negotiable instrument, such as the addition of another name as maker, by one not a stranger to the paper, whether injurious or not, avoids the contract as to all the parties not consenting. (p. 136.)

NEGOTIABLE INSTRUMENTS—ALTERATION—MATERIALITY.—Whether an alteration of a negotiable instrument is material or not is to be determined by the court by an inspection of the instrument itself. (p. 136.)

Thomas E. Knight, for the appellant.

R. M. Douglas, contra.

²⁹³ HARALSON, J. The plea of defendant on which the case was tried, and a demurrer to which was sustained, presents the only question for review. The plea of non est factum set

up that William Brown, the defendant, gave to Johnson Brothers, the plaintiffs, the note sued on against him alone, for ninety-nine dollars and ninety-nine cents, and after its execution and delivery to the plaintiffs, without the consent or authority of defendant, they caused or procured the note to be signed by one Bob Jackson, as a comaker with defendant of said instrument; that at the time defendant executed and delivered the note sued on, he was the sole maker of the same, and that the addition of the name of Bob Jackson as a comaker with the defendant thereof was without the knowledge, consent, or authority of defendant.

²⁹⁴ The question presented is one of conflicting opinion in the adjudications of courts. In *Toomer v. Rutland*, 57 Ala. 385, 29 Am. Rep. 722, this court stated the reason of the rule against alterations in notes to be the necessity of guarding against and punishing all tampering with the instrument the parties have entered into, and made the sole memorial and exposition of their contract. The court further said: "The motive of a creditor in making the alteration may not be fraudulent—as in the present case—*mala fides* may not be imputable to him; yet, as the alteration changes the legal identity and effect of the instrument, the debtor may well say it is not the contract into which he entered, and he is not, therefore, bound by it, and that the identity and legal effect of the contract into which he did enter has been voluntarily destroyed by the creditor, and ceased to exist: *Wood v. Steele*, 6 Wall. 80. The principle does not rest on the hypothesis that fraud is an indispensable element of the alteration—it proceeds as well on the necessity of preventing, as punishing of, fraud: *Glover v. Robbins*, 49 Ala. 219, 20 Am. Rep. 272."

At an early day in this court, while holding that if an alteration be material, and made by the party claiming under it, he cannot enforce it, it was also held that the addition of two names as makers of a several promissory note, placed there without the consent of the maker, would not avoid it, unless placed there for a fraudulent purpose: *Montgomery R. R. Co. v. Hurst*, 9 Ala. 513.

This doctrine, however, seems to have been departed from in later decisions of this court. In *Anderson v. Bellinger*, 87 Ala. 334, 13 Am. St. Rep. 46, 6 South. 82, while holding that alterations in the writing by a third person, who was not a party to it, cannot change its legal operation and effect, and do not discharge the surety on the original paper, it was further held that a surety (as in that case) has the right to stand upon the very

terms of his contract, and if alterations change the real meaning of the undertaking, whether presumptively to the detriment or advantage of the surety, and whether the effect is to add to or take from the liability, by the introduction of different ²⁸⁶ parties or otherwise, the surety is discharged; citing authorities to the point.

In the later case of *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 South. 498, in discussing such alterations the court said: "The law proceeds on the idea that the identity of the contract has been destroyed, that the contract made is not the contract before the court, that the party did not make the contract which is before the court; and so adjudging, it cannot go further, and hold him bound by it, on speculations, however probable and plausible, that he would or ought to have entered into the altered agreement, because it involved less liability than the original and only paper executed by him." After alluding to the fact that there were expressions in the books to the contrary, the court added: "The sounder doctrine, and certainly the one supported by the overwhelming weight of authority, is that stated in *Anderson v. Bellinger*, 87 Ala. 334, 13 Am. St. Rep. 46, 6 South. 82, and there applied to a surety, that any material alteration, by one not a stranger to the paper, whether injurious or not, avoids the contract as to all the parties not consenting. It is enough that if the instrument were genuine it would operate differently from the original, or, as otherwise expressed, avoidance will result, 'if the alteration is one which causes the paper to speak language different in legal effect from that which it originally spoke.' That the alteration was a material one, we have no doubt. The considerations just adverted to demonstrate that it was; and the authorities are full to the point that the addition of other names as makers discharges parties already bound by the paper"; citing authorities. As to materiality of such changes, and the rule for determining them, the courts lay down the doctrine that "the court is to determine the materiality of the alteration by an inspection of the instrument. Evidence aliunde will be received to show the fact of alteration, and in a proper case, also, that the alteration was in accordance with the intention of the parties; but with these exceptions the court cannot, on the question of materiality, look beyond the paper. Considering the original comparison with the altered paper, it is to determine ²⁹⁶ whether the latter, assuming its genuineness, evidences a contract materially variant from the former. It can make no difference that the parties, the addition of whose names con-

stitutes the alteration, are not in fact bound by the instrument. On the face of it they are bound. On its face, therefore, the contract is not identical with the original. The legal identity of the first is destroyed, and parties not consenting thereto are discharged": *Haskell v. Champion*, 30 Mo. 136; *Ford v. Cameron Nat. Bank* (Tex. Civ. Ap.), 34 S. W. 684, 2 Am. & Eng. Ency. of Law, 2d ed., 233, and authorities there cited.

Whatever may be the rule, as maintained in some of the courts, it must be held as firmly settled in this court that such an alteration as is set up in defendant's plea avoids the contract as to the original maker of the note. The demurrer to said plea should have been overruled.

The judgment of the lower court is reversed and the cause remanded.

Alteration of Instruments as affecting their validity is considered in the monographic note to *Woodworth v. Bank of America*, 10 Am. Dec. 267-273. The addition of the name of another maker to a note after its delivery discharges the prior makers not assenting thereto: *Rhodes v. Leach*, 93 Iowa, 337, 57 Am. St. Rep. 281, 61 N. W. 988. The addition to a joint and several note of the name of another person, without the assent of one of the makers, is a material alteration avoiding the instrument: *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 814; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48.

DEEGAN v. NEVILLE.

[127 Ala. 471, 29 South. 173.]

INJUNCTION—TRESPASS.—An injunction will not be granted to restrain a trespasser merely because he is such. (p. 139.)

INJUNCTION—TRESPASS.—The foundation of the jurisdiction to enjoin trespassers rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits. (p. 139.)

INJUNCTION.—WHETHER AN INJURY IS IRREPARABLE so as to authorize the granting of an injunction must be determined by the particular facts shown in each case. To be irreparable, injury must be of a peculiar nature, so that compensation in money cannot atone for it, or where it can thus be atoned for, it must appear that the defendant is insolvent, and on that account unable to atone for it. (p. 139.)

INJUNCTION—TRESPASS—DESTRUCTION OF FULL ENJOYMENT.—Where trespasses are not destructive of the use for which premises are rented, and the tenant's business is not inter-

ferred with, the tenant shows no ground for an injunction by reason of the destruction of the right of his full enjoyment of the premises. (pp. 139, 140.)

INJUNCTION—REPEATED TRESPASSES.—The mere fact that acts of trespass are often repeated does not in itself authorize the issuance of an injunction to restrain their commission. (p. 140.)

INJUNCTION—TRESPASS—MULTIPLICITY OF SUITS.—The doctrine that equity will enjoin trespasses to prevent a multiplicity of suits has no application to persons who are guilty of a repetition of the same trespasses, simply because there may be several of them asserting to do so under the authority of, and by the direction of, one of them who alone claims the right to the possession of the lands. (p. 141.)

INJUNCTION—TRESPASS OF LANDLORD—COVENANT FOR QUIET ENJOYMENT.—A tenant is not entitled to an injunction against his landlord to restrain him from committing trespass upon the leased property, since he may have a full and adequate remedy in an action at law upon his implied covenant of quiet enjoyment. (p. 141.)

L. H. & E. W. Faith, for the appellants.

No counsel appeared for the appellee.

⁴⁷⁷ **TYSON, J.** This bill was filed to enjoin the continuance of certain alleged trespasses. It appears that the complainant has a mere chattel interest in the lands. His possession of the premises was for a term, which expired on the first day of November, 1900, and the alleged trespasses appear to have been committed during the month of September preceding, by his landlord and his employes, the other defendants. Only thirty-seven days of his term remained between the date of the filing of the bill and the expiration of his possessory interest under his lease. The bill fails to disclose the nature and character of the use or enjoyment of the premises, but it appears from the lease, which is made an exhibit to the amended answer of respondent Deegan, that the house on the premises was rented by complainant to be occupied as a saloon or bar-room "with yard privileges at west end (of house) to a certain board fence." We may presume that the complainant was occupying the house in conformity to the terms of the lease; that is, he was occupying it as a bar-room, and was conducting a liquor business in it, though it is not so averred in the bill. The trespasses most grievously complained of were those alleged to have been committed upon this yard, which from their nature and character made it dangerous to the person to go into it or along or across it. The purposes for which this yard was used by the complainant is not shown by the bill. Indeed, it is silent on this point, failing to show any use whatever of it by complainant. And if resort be had to the affidavits filed by complainant in support of the truth of the

allegations of the bill, we find that the only use he made of it was to traverse it in going to and from a water-closet which was located in the extreme northwest corner of this yard, which closet did not belong to him under the terms of the lease, and to which ⁴⁷⁸ he had no exclusive right of enjoyment, if, indeed, it can be said he had any right to use it at all. But we may concede for the purposes of this case that the yard was embraced in the lease, and that complainant was entitled to its exclusive possession, and also of the water-closet, and yet, it does not follow that he is entitled to injunctive relief against trespassers.

It is a universal rule that an injunction will not be granted to restrain a trespasser merely because he is a trespasser. The foundation for the exercise of the jurisdiction of a court of equity in the restraining of threatened trespasses rests upon the inadequacy of legal remedies to compensate for probable injuries, which may result if the commission of the trespass is not restrained. This principle is stated by Mr. High in his work on Injunctions, first volume, section 697, in this language: "The jurisdiction may now, however, be regarded as well established, although it is still sparingly exercised, being confined to cases where, from the peculiar nature of the property affected by the trespass, or from its frequent repetition, the injury sustained cannot be remedied by an action for damages, and where it may, therefore, be properly termed irreparable. The foundation of the jurisdiction rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits, and where facts are not shown to bring the case within these conditions, the relief will be refused. Equity will not, therefore, enjoin a mere trespass to realty as such, in the absence of any element of irreparable injury."

What is an irreparable injury is often difficult to determine, but it must, in all cases, be determined by the particular facts shown in the case under consideration. It is said by Pearson, J., in *Gause v. Perkins*, 56 N. C. 179, 69 Am. Dec. 728: "The injury must be of a peculiar nature, so that compensation in money cannot atone for it; where, from its nature, it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable."

⁴⁷⁹ Mr. Freeman, in his note to the case of *Jerome v. Ross*, 11 Am. Dec. 500, after reviewing the cases involving the principles underlying the issuance of writs of injunction against trespassers, the basis of the jurisdiction and showing the injury

must be irreparable, says: "This definition is perhaps as accurate as any that can be framed." Continuing he says: "It is thus seen that the ultimate ground upon which equitable intervention in cases of trespass rests is the inadequacy of legal remedies for the injury, which is the broad foundation of all remedial jurisdiction in equity. . . . An injury resulting from trespass may be incapable of compensation in damages from a variety of reasons: 1. It may be destructive of the very substance of the estate; 2. It may not be capable of estimation in terms of money; 3. It may be so continuous and permanent that there is no instant of time when it can be said to be complete so that its extent may be computed; 4. It may be vexatiously persisted in, in spite of repeated verdicts at law; 5. It may be committed by one who is wholly irresponsible, so that a verdict against him for damages would be entirely valueless; 6. It may be committed against one who is legally incapacitated from a beneficial use of the remedy at law."

It is manifest from the averments of the bill that only two of the reasons assigned by Mr. Freeman have been attempted to be invoked in this case. The first is, the destruction of the right of full enjoyment by the complainant of the premises. This consists in making it dangerous to go to and from the water-closet on account of the dropping of brick from above, the breaking of this closet so as to cause the water flowing from it to overflow the yard, so as to render the same a menace to health on account of its unsanitary condition, and in rendering the rear wall of the house unsafe by nailing braces and supports upon it. The damage done to the closet and the menace to health caused by the overflow of the yard by the water flowing through it, being so easily remedied, they are hardly worthy of notice in considering the question of destruction of the enjoyment of the premises. And this may be said of the entire deprivation of the complainant to use the closet at all. As to the unsafe ⁴⁸⁰ condition of the wall, it is not shown that it would most likely fall before the termination of the complainant's occupancy of the house, thereby depriving him of its use. So far as we are advised, his business was not in any manner interfered with, and certainly the facts averred were not destructive of, or ruinous to, the use for which the premises were rented. And unless this be shown, the injury is of such a nature as is susceptible of adequate pecuniary compensation in damages: *Kellar v. Bullington*, 101 Ala. 271, 14 South. 466.

The second reason attempted to be invoked is that the injuries and trespasses are of a recurrent and continuous nature.

No facts are alleged supporting this averment. It is a bald assertion of the pleader, and seems to be predicated upon repeated acts of trespass alleged to have been committed by the respondents. To make the injury or trespass a continuing one, it must be of such a character as that its recurrence is not dependent upon any act to be done by any person. Thus, where a person erects a dam by which another's land would be inundated and his timber periodically destroyed, though the act done was a single one—that of erecting the dam—the trespass would not be single. Every rise of the water occasioned by heavy rains would produce another injury, so that from the very nature of the injuries there would be constantly recurring grievances, and the jury would be unable to fix upon a time when the wrong may be said to be complete. Adverting to the allegation of repeated trespasses, it is only necessary to say, adopting the language of Justice Lumpkin, in *Hatcher v. Hampton*, 7 Ga. 49: "It has never been supposed, that because one person chooses daily to pull down the fence of another, and turn his stock in his fields, that this would authorize the courts of chancery to restrain the intruder by injunction": *Ellsworth v. Hale*, 33 Ark. 633. Applying that principle to this case, we cannot hold that the acts of trespass complained of, though oft-repeated, would authorize the writ of injunction in this case.

The only other point now to be considered is the one presented by the last paragraph of the amended bill. ⁴⁸¹ As this appears to be the one upon which the complainant relied for the exercise of the jurisdiction of the court, we quote it. It reads as follows: "Your orator further shows and submits unto your honor that his remedy at law for said continuous injuries and trespassing is entirely inadequate for the reason that such remedy at law would necessitate a multiplicity of suits," etc. Waiving all objections to this averment on account of its failure to state the facts from which the conclusion may be drawn that complainant's remedy at law is inadequate, for the reason that such remedy at law would necessitate a multiplicity of suits, it is not a ground for equitable interference in this case. It is not doubted that the prevention of litigation under some circumstances is a subject of equity jurisdiction. And so, too, the necessity of preventing a multiplicity of suits affords an exception to the general doctrine, that equity will not interpose by the extraordinary remedy by injunction when adequate relief may be had in the usual course of procedure at law. But in order to bring the case within the exception and to warrant the interference in such cases, it must be shown that there are different persons assailing the same

right "and each standing on his own pretensions." This doctrine has no application to persons who are guilty of a repetition of the same trespasses, simply because there may be several of them asserting the right to do so under the authority of, and by the direction of, one of them who alone claims the right to the possession of the lands: *Hatcher v. Hampton*, 7 Ga. 49; *Moses v. Mayor, etc.*, 52 Ala. 210; 1 High on Injunctions, sec. 700.

This case, in its last analysis, may be stated to be, adopting the most favorable view of it as presented by the complainant, a breach by the defendant, landlord, of his covenant for quiet enjoyment arising out of his contract of lease, an unauthorized re-entry by him upon a portion of the leased premises, and the taking of the possession of the same, for which he is liable in an action at law upon his implied covenant of quiet enjoyment—a remedy, if pursued, full and adequate to compensate complainant in damages for all injuries he may have suffered by reason of the breach.

⁴⁸² The decree of the chancellor refusing to dissolve the injunction must be reversed, and a decree will be here rendered dissolving it.

Continued Trespasses May Be Enjoined: *Boston etc. R. R. v. Sullivan*, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; *New York etc. R. R. Co. v. Scovill*, 71 Conn. 136, 71 Am. St. Rep. 159, 41 Atl. 246. It is not usual, however, to issue an injunction to restrain a trespass merely because it is such, without showing that the property trespassed upon has some peculiar value that could not admit of due recompense, or that it would be destroyed by repeated or continuous acts of trespass: *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091. Mere trespasses of ordinary character will not be enjoined: *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 South. 106. To justify an injunction, the damage must appear irreparable: *Indian River etc. Co. v. East Coast etc. Co.*, 28 Fla. 387, 29 Am. St. Rep. 258, 10 South. 480; *Jerome v. Ross*, 7 Johns. Oh. 315, 11 Am. Dec. 484. See further on this subject the extended notes to *Jerome v. Ross*, 11 Am. Dec. 498-507; *Smith v. Gardner*, 53 Am. Rep. 346-355.

Injunction.—An injury is irreparable, so as to justify an injunction against its continuance, if it is one for which there can be no adequate compensation in money, or which, if continued, may become the foundation of adverse rights, or occasion a multiplicity of suits, or materially lessen the enjoyment of property by its owner: *Tree v. Larson*, 84 Iowa, 649, 35 Am. St. Rep. 336, 51 N. W. 179. See the note, on irreparable injury, to *Dudley v. Hurst*, 1 Am. St. Rep. 374-379.

GRIFFIN v. CHATTANOOGA SOUTHERN R. R. CO.

[127 Ala. 570, 30 South. 523.]

HOMESTEAD—GOVERNMENT LAND—CONVEYANCE—ACKNOWLEDGMENT OF WIFE.—If a married man procures a homestead certificate to government land, and he and his family live upon the land, cultivating it, and claiming it as his homestead, it is a homestead from the time of entry and before patent issues, and a deed conveying a strip of such land to a railroad as a right of way is void, where the wife makes no acknowledgment separate and apart from her husband, as required by the law of the state where the land is situated. (pp. 143, 144.)

C. Daniel, for the appellant.

Burnett & Culli, contra.

⁵⁷¹ **TYSON, J.** In 1889 the plaintiff procured a homestead certificate from the United States land office for the land sued for. At that time he was a married man, and resided upon the tract of land of which the strip in controversy was a part. He and his family continued to live upon the land from the date of his entry to the time of the trial of this case, improving and cultivating it, claiming it as his homestead. In 1895 he perfected his title and procured a patent to the tract from the United States. In August, 1890, he and his wife executed to the Chattanooga Southern Railway Company, through whom the defendant claims title by mesne conveyances, a quitclaim deed to the strip in controversy as a right of way. There was no separate and apart acknowledgment by the wife to this deed. The only question presented is, Was this necessary in order to make the deed a valid conveyance of the right of way attempted to be conveyed by it? In other words, Was the tract of land over which the right of way was attempted to be granted the homestead of the plaintiff ⁵⁷² under the constitution and statutes of this state? If this question is answered affirmatively, the separate and apart acknowledgment of the wife was indispensable to the validity of the deed: Code, sec. 2034; McGhee v. Wilson, 111 Ala. 615, 56 Am. St. Rep. 72, 20 South. 619.

Why was it not the homestead of the plaintiff at the date of the execution of the deed? There are two contentions urged against its being the plaintiff's homestead. The first is, that under the homestead and pre-emption laws, the plaintiff acquired no title to the land until he procured his letters patent; that the title was in the United States government, and the only right the

plaintiff had was the right to perfect his title after five years' actual occupancy. That he could not sell or convey it, or any portion of it, except for church, cemetery, or school purposes, or for the right of way of railroads, without destroying his right to complete and perfect his title. The land was not subject to taxation by the state until he acquired the title, and abandonment of it by him at any time before the expiration of the period of occupancy required would destroy his right to ever perfect his title. All this may be conceded, and yet the land was the homestead of the plaintiff. It is not the quality and the quantity of the estate, but the uses to which the land is devoted that impresses it with the characteristic of a homestead. "The great controlling purpose and policy of the constitution is the protection, the preservation, of the homestead—the dwelling place. . . . It is the home place—the roof that shelters—the constitution and statutes protect from liability to the payment of debts, and when the owner is a married man, subject to the restrained alienation. . . . Usually, it is accompanied by an estate or interest; but if it is not, it is the misfortune of the occupant": *Watts v. Gordon*, 65 Ala. 546; *Tyler v. Jewett*, 82 Ala. 93, 2 South. 905; *Gaylord v. Place*, 98 Cal. 472, 32 Pac. 484; *Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248; *Watterson v. Bonner*, 19 Mont. 554, 61 Am. St. Rep. 527, 48 Pac. 1108.

The second contention is, that if a separate and apart acknowledgment be required, this would be placing a limitation on the plaintiff's right to transfer the right ⁵⁷³ of way in face of the Revised Statutes, section 2288, page 419, authorizing him to do so. This statute is in these words: "Any person who has already settled or hereafter may settle on the public lands, either by pre-emption or by virtue of the homestead law or any amendments thereto, shall have the right to transfer, by warranty against his own acts, any portion of pre-emption or homestead for church, cemetery, or school purposes, or for the right of way of railroads across such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their pre-emptions or homesteads." This language does not undertake to regulate or prescribe the formalities of the transfer, other than by warranty deed. It simply confers the right as against the government and nothing more. The deed, when made to convey title to the grantee must conform to the laws of the state where it is executed and the land is situate. This is the prerogative of the states. "When the *lex rei sitae* requires certain forms to be adopted in order to validate the transfer of property, such forms must

be complied with": Wharton on Conflict of Laws, sec. 683. See, also, sec. 275; United States v. Fox, 94 U. S. 315.

The deed executed by the plaintiff was void, and the affirmative charge requested by him should have been given.

Reversed and remanded.

Public Lands—Title of Individual.—When public lands have been thrown open to private acquisition, one who complies with all the requisites to entitle him to a patent for any particular tract is regarded as the equitable owner thereof: See the monographic note to *Schneider v. Hutchinson*, 73 Am. St. Rep. 480. Consult, also, *State v. Bridges*, 22 Wash. 64, 79 Am. St. Rep. 914, 60 Pac. 60; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295; *Wittenbrock v. Wheadon*, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664. A mortgage by one who has entered a homestead and acquired the receiver's final certificate is valid, though given prior to the issue of a patent: *Meinhold v. Walters*, 102 Wis. 389, 72 Am. St. Rep. 888, 78 N. W. 574.

A Conveyance of a Homestead by a husband and wife without her separate acknowledgment is a nullity: *Hodges v. Winston*, 95 Ala. 514, 36 Am. St. Rep. 241, 11 South. 200. A conveyance of a homestead not acknowledged by her is void: *Thompson v. New England Mortgage Co.*, 110 Ala. 400, 55 Am. St. Rep. 29, 18 South. 315. See, also, *Council Bluffs Sav. Bank v. Smith*, 59 Neb. 90, 80 Am. St. Rep. 669, 80 N. W. 270; *Shields v. Bush*, 169 Ill. 534, 82 Am. St. Rep. 474, 59 N. E. 962.

WOODRUFF v. HUNDLEY.

[127 Ala. 640, 29 South. 98.]

WILLS—SUBSCRIBING WITNESSES.—The statutory requirement that a will must be attested by at least two witnesses, who must subscribe their names in the presence of the testator, is one of the essential requisites to the validity of a will, and must be proved before it can be admitted to probate. (p. 147.)

WILLS—SUBSCRIBING WITNESSES—PRESUMPTION.—Upon proof of the genuineness of the handwriting of the testator, and of the witnesses when dead, it will be presumed that all the requisites of the statute have been complied with, unless the contrary appears upon the face of the will. (pp. 148, 149.)

WILLS—ATTESTING CLAUSE, ABSENCE OF.—A will need not recite that the witnesses subscribed their names in the presence of the testator, nor have any attestation clause whatever. From the mere proof of the genuineness of their signatures, it will be presumed that they subscribed their names regularly. (p. 148.)

WILLS—DUE EXECUTION—PRESUMPTION OF FACT.—The presumption of due execution of a will is not one of law, but of fact, which is for the jury to determine. (p. 149.)

WILLS—SEPARATE DETACHED SHEETS.—A will may be written upon separate sheets of paper, and be valid though they remain disconnected. (p. 150.)

WILLS—REVOCATION—ACTS AND INTENT.—To revoke a will there must be a burning, tearing, canceling, or obliterating, with the intention to revoke it, or a new will or codicil, properly executed and attested. (p. 150.)

WILLS—REVOCATION—WHAT NOT A TEARING.—Where a will is written on separate pieces of paper fastened together, the mere removing of the fastenings by the testator is not such a tearing as will constitute a revocation of the will. (pp. 150, 151.)

WILLS—REVOCATION.—THE UNEXECUTED INTENTION of a testator to revoke his will is of no consequence. (p. 150.)

WILLS—REVOCATION — EVIDENCE — DECLARATIONS OF TESTATOR.—In the absence of proof of any act of revocation, declarations of a testator subsequent to the making of his will tending to show a revocation are incompetent as evidence and inadmissible. (p. 151.)

WILLS—WHO MAY PROBATE.—In Alabama, only an executor, devisee, or legatee named in a will, or some person interested in the estate, has authority to probate the will. (p. 151.)

WILLS—CONTEST—JUDGMENT.—In a will contest, the only judgment authorized to be rendered is one against or sustaining the validity of the instrument. (p. 152.)

WILLS—CONTEST—OBJECTION OF NO RIGHT TO PROBATE—ABATEMENT.—In a will contest, the objection that the proponent has no right to prove the will is in the nature of a plea in abatement, which is waived by the contestant pleading to the merits, and such ground of contest may be stricken out. (p. 152.)

WILLS—CONTEST.—AN INSTRUCTION which omits all reference to the due execution of the will as a ground of contest is faulty in this respect. (p. 152.)

WILLS — CONTEST — DUE EXECUTION. — Instructions are improper if they tend to take from the jury the question of the due execution of the will. (p. 152.)

WILLS — CONTEST — CONSTRUCTION OF CLAUSES.—In a will contest, the questions whether certain provisions of the will are void for uncertainty and do not constitute a valid trust are foreign to the proceeding, and cannot be considered, since this merely involves a construction of those provisions. (p. 152.)

R. W. Walker, Milton Humes, and W. T. Sanders, for the appellant.

Thomas C. McClellan, Harris & Eyster, and Oscar R. Hundley, contra.

649 **TYSON, J.** The testatrix, a resident of Alabama, went to a hospital in the city of Nashville, Tennessee, for the purpose of having a surgical operation performed. Apprehending that the operation might be fatal, she had a lawyer of that city to prepare the paper propounded for probate as her last will and testament, which she signed in his presence and which he subscribed as a witness in her presence. The paper was left with her with instructions to have at least two other persons subscribe their names as witnesses.

There appears upon this paper in connection with the word "witness" (to the right of it), which word was written by the lawyer who prepared the paper, directly opposite to it, one name, and under that name another name. To the left of these names, and on the line immediately below, the name of E. M. Hussey appears. The first two names were those of the two physicians who were to perform the operation, and were in attendance upon the testatrix, and who are shown to have had knowledge of the preparation of the will. The third was the name of a physician who was an inmate of the hospital at the date of the signing of the instrument, and a friend of the testatrix. These three physicians are dead, and there was proof of the genuineness of their signatures, as well as that of the testatrix. No witness to the paper propounded for probate, except the first, who did not see the others attest it, saw the testatrix sign it. But this is of no moment, as it is not necessary that the witnesses should actually see the testatrix sign her name. An acknowledgment by her to them of her signature to the instrument is sufficient: 2 Greenleaf on Evidence, 16th ed., sec. 676. On this proof of the execution of the instrument, the court admitted it in evidence against the objection of the appellant. The point of objection taken is, that there was an entire absence of proof that two witnesses subscribed their names as witnesses in the presence of the testatrix.

One of the essential requisites to the validity of the instrument as a will is that it must be attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator: Code, sec. 4263. Unless this requisite of the statute was complied with, ⁶⁵⁰ the instrument was ineffectual to pass real or personal property. It was not a will at all within the purview of the statute, and cannot be admitted to probate. Proof of this essential requisite is just as necessary in order to probate the paper as a will as was a compliance with the statute necessary to give validity to it. Nor do sections 4276-4277 of the code dispense with the necessity of making this proof.

In speaking of section 4276, this court said in *Barnewall v. Murrell*, 108 Ala. 381, 18 South. 838: "The statute was intended to prescribe, and prescribes, a definite rule, regulating the admission of that which may be appropriately termed secondary evidence, when the primary evidence of the execution of wills is not attainable. The proper construction of its words and their real sense and meaning is, that if any one or more of the subscribing witnesses, because of the events or the disabilities mentioned, cannot be produced, there may be a resort to the second-

ary evidence for which it provides, the equivalent in degree of the unattainable primary evidence." And it may be added that these two sections are nothing more than a legislative declaration of the common-law rule: 1 Greenleaf on Evidence, 16th ed., sec. 572.

The requirement of the statute that the signature of the testator must be "attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator," so far as the question here involved is concerned, is substantially the same as was the language employed in the English statute of frauds (29 Charles II, c. 3, sec. 5), from which it was borrowed, and is identical in language with many of the statutes of other states.

The question under consideration has been frequently passed upon by the English and American courts. Where the attestation clause is complete, reciting the facts showing a compliance with all the requirements of the statute, it seems that it has been universally held that the presumption will be indulged, upon proof of the genuineness of the handwriting of the testator, and of the witnesses when dead, that all the requisites of the ⁶⁵¹ statutes have been complied with, unless the contrary appears on the face of the will: 1 Redfield on Wills, 238, and note; Schouler on Wills, sec. 347; 29 Am. & Eng. Ency. of Law, 199; 1 Underhill on Wills, p. 276, sec. 201, note 1.

The only evidence of attestation of the will before us, appearing on the face of the instrument, is the word "witness" and the subscription of the names of the witnesses. In other words, there is no recitation that the witnesses subscribed their names in the presence of the testatrix.

The statute does not require the attestation clause. Hence its complete omission would have no effect upon the validity of the will. A fulfillment of the statutory requirements is all that is necessary, and this may be proven without any recital of the fact in the will or in an attestation clause attached to it. No particular form of words is essential to constitute an attestation: 1 Jarman on Wills, *p. 91, top p. 123. And indeed "the word 'attest' or 'witness' or some similar expression not fully stating a compliance with all the statutory requirements, will answer the purpose": 1 Underhill on Wills, sec. 200, p. 275, and notes.

In *Croft v. Pawlet*, 2 Strange, 1109, the attestation clause was in these words: "Signed, sealed, published, and declared as and for his last will, in the presence of us, A, B, and C." The witnesses were all dead and the genuineness of their signatures was proven. "It was objected that this was not an execution

according to the statute of frauds; and the hands of the witnesses could only stand to the facts they had subscribed to, and signing in the presence of the testator was not one." The court held it was evidence to be left to the jury of a compliance with all circumstances. The attestation clause was in the same language in *Hands v. James, Comyn, 531*. The witnesses were dead, and there was proof of their signatures. The same objection was urged against the sufficiency of the proof of the execution of the will as was in *Croft v. Pawlet, 2 Strange, 1109*. The court said: "These witnesses have set their names and it must be intended they did it regularly."

⁶⁵² In the Case of *Johnson, 2 Curt. Ecc. 341*, the testator executed his will while in India, which was attested by two witnesses, but it did not appear upon the face of the paper that the requisites of the act had been complied with. The court assumed that the will was duly executed.

In *Trott v. Skidmore, 2 Swab. & T. 12*, the will was in the handwriting of the testator, and written 1832. The attestation was "witnesses," followed by the names, which was dated April 11, 1838, and written in different colored ink. Both the witnesses were dead, and their names were in their respective handwriting. No account was given of the manner in which the will was executed. The court said: "The difference of the color of the ink in which the names of the attesting witnesses are written might have been caused by blotting paper being used to one, and not to the other. At all events it is too slight a circumstance to found any presumption on; and on the facts as proved, the usual presumption *omnia rite esse acta* must prevail."

The principle announced in these cases has been approved and followed by the courts of this country as will be shown by an examination of the following cases: *Nickerson v. Buck, 12 Cush. 332*; *Ela v. Edwards, 16 Gray, 91*; *Elliott v. Elliott, 10 Allen, 357*; *Jackson v. Christman, 4 Wend. 277*; *Clarke v. Dunnavant, 10 Leigh, 13*; *Deupree v. Deupree, 45 Ga. 415*; *Fatheree v. Lawrence, 33 Miss. 585*.

The presumption of due execution, however, is not one of law, but of fact which the jury may indulge. It is a question, then, for the jury to determine whether all the requisites of the statute have been complied with. There was no error in admitting the will in evidence.

These principles have been recognized and enforced by this court in the case of *Arrington v. Arrington, 122 Ala. 510, 26 South. 152*, involving the proof of the execution of a deed.

By agreement of counsel the original will is before us for ex-

amination. One of the grounds of contest is that it was revoked by the testatrix by "tearing the same apart with the intention of revoking it."

Section 4265 of the code provides that "except in the cases provided in the preceding article, a will in ⁶⁵³ writing can only be revoked by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence," etc. When the will was written and signed by the testatrix, it was upon two separate sheets of paper, and there is no evidence except from the holes near the top and sides of the sheets that they were ever fastened together. And if fastened together there is no evidence that the fastening was done by the testatrix unless it may be inferred from her possession of it. So, too, there is no evidence that the sheets were ever separated by her, if it be inferred that they were once attached, except that after her death, when the will was found in a box in the bottom of her trunk, carefully folded and wrapped in a newspaper, around which was pinned a towel, upon which her name was written, the sheets were apart, and there were no fastenings in the holes. So, then, the only evidence of a detachment or separation of the sheets, if it be conceded that they were fastened together by the testatrix, is the physical appearance of the paper itself. This attachment of the sheets, it is evident from an inspection of the holes, was by the means of pins—two of them inserted near the top and each side of the sheets.

A revocation, of necessity, implies the existence of a valid will—a vacating of an instrument previously executed, effectual as a will. And its existence is presumed until rebutted by proof of its subsequent revocation: 2 Greenleaf on Evidence, sec. 680. It is of no consequence that this will was written upon separate sheets of paper. And had these sheets remained disconnected, this would not have been an objection to its validity or afforded an inference of its revocation by the testatrix: *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831. Conceding that the pins which constituted the means of fastening the sheets together were placed there by the testatrix and removed by her, thereby restoring the paper to the condition in which it was when signed by her, did this amount to a tearing of the will, within the meaning of the statute? Not a syllable, word, phrase, or sentence of the will was erased, torn, or disturbed. Every word as written was preserved. Indeed, the sheets of paper ⁶⁵⁴ upon which the writing was done, with the exception of the pin holes and the traces made upon them by the ravages of time, were in the same condition when found after the testatrix's death as when the

words of the will were traced upon them by the pen of the scribe, executed by the testatrix, and subscribed by the witnesses.

In *Law v. Law*, 83 Ala. 434, 3 South. 753, it is said: "That no revocation can be effected by mere word of mouth, or nuncupative declaration, any more than could be done under the English statute of frauds. It requires one or more of the specific acts mentioned in the statute—a burning, tearing, canceling, or obliterating, with the intention to revoke, or a new will or codicil, properly executed and attested. To what extent an obliteration of the instrument must extend to be effectually revocatory cannot be stated with any great degree of particularity. The paper must certainly be materially mutilated, so that, if unexplained by accompanying declarations, an intent to revoke may be inferred from its appearance, taken in connection with the act itself. As said in *Evans' Appeal*, 58 Pa. St. 238, the act done to the will must be one which 'stamps upon it an intention that it [the paper] shall have no effect'—'an act done to the paper itself, a mark upon it, evincible of a present intent that it shall not operate as a will.' "

Revocation is an act of the mind which must be demonstrated by some outward and visible sign. As said by a learned judge: "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying: There must be two": *Cheese v. Lovejoy*, 2 Prob. Div. 251.

It is not the mere manual operation of tearing the instrument which will satisfy the law; the act must accompany the intention of revoking; there must be the act as well as the animus, both must concur in order to constitute a legal revocation: *Clark v. Scripps*, 2 Rob. Ecc. 563; *Reed v. Harris*, 6 Adol. & E. 209; ~~655~~ *Clark v. Smith*, 34 Barb. 140; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604.

We are clearly of the opinion that the removing of the fastenings by the testatrix was not a tearing of the will within the meaning of the statute. As there was no tearing of the will, it is of no consequence what may have been the unexecuted intention of the testatrix to revoke it.

All declarations of the testatrix subsequent to the making of this will tending to show that she had revoked it were clearly incompetent, no act of revocation having been shown: *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Clark v. Smith*, 34 Barb. 140; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, and note; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604, and authorities there cited; 2 *Greenleaf on Evidence*, sec. 690; 1 *Redfield on Wills*, 543; 29 *Am. & Eng. Ency. of Law*, 326.

The seventh ground of contest is that the petitioner is not the executor named in the instrument propounded for probate, neither is he one of the devisees or legatees named therein or interested in the estate of the decedent.

It may be, and it is, doubtless, true that only an executor, devisee, or legatee named in a will or some person interested in the estate has the authority to have the will proved before the probate court: Code, sec. 4272. But upon a contest of a will before the probate court, the grounds of contest are that the will was not duly executed, the unsoundness of mind of the testator, or any other valid objections thereto: Code, sec. 4287. The other valid objections must be of the character as that involves the validity of the instrument itself. The only judgment authorized to be rendered is one against the validity of the will or one sustaining its validity: Code, sec. 4293. The ground of contest under consideration presents no such objection. Indeed, the will may be valid without anyone being named as executor. Nor would the death of the person named as executor affect its validity. This ground simply puts in issue the right of the proponent to make proof of the will; in other words, his right to propound it for probate. It is in the nature of a plea in abatement, and raised an issue which should have been tried before pleading to ^{the} merits. By pleading to the merits, either before or at the same time this ground was pleaded, the contestant lost his right to insist upon it. He waived his right to insist preliminarily that the proponent was not the executor named in the will: 1 Ency. of Pl. & Pr. 32; *Hurt v. Turk*, 15 Ala. 675. The proponent's motion to strike this ground of contest should have been granted: *Brown v. Powell*, 45 Ala. 149.

Many of the numerous assignments of error are based upon the rulings of the court in admitting and excluding evidence offered in support of and against the issue raised by this ground, and upon the giving and refusing of charges requested relative to that issue. So, too, a great many exceptions were reserved by the contestant to the admission of evidence against his objection, and to the exclusion of evidence offered by him, upon the question of revocation of the will by the testatrix. However, we will not further consider any of these matters, as the questions growing out of them will probably not arise upon another trial.

Charge 4, given at the request of proponent, pretermits all reference to the due execution of the will as a ground of contest and was faulty in this respect if in no other.

Charges 5 and 11, given at the instance of proponent, were improper. They tend to take from the jury the question of the

due execution of the will, which was a matter exclusively for their determination.

After the verdict of the jury was rendered, the contestant moved the court to omit from the judgment upon the verdict the provisions of the will contained in items 14 and 15, because they were illegal and void for uncertainty, and do not constitute a valid charitable trust. It is obvious that this simply involves a construction of those clauses, and was entirely foreign to the proceeding in which the court was required to enter judgment upon the verdict of the jury. The court was without jurisdiction to entertain the motion.

With the seventh ground of contest eliminated by striking it, as the court before entering upon another trial should do, and there being no revocation of the will shown, nor any evidence tending in the remotest ⁶⁵⁷ degree to show mental incapacity to make it or undue influence exercised in procuring its execution, the issue is narrowed to the single one of due execution. And this the proponent is entitled to have the jury determine upon making proof of the genuineness of the signature of the testatrix and of the signatures of two of the subscribing witnesses.

For the errors pointed out the judgment must be reversed and the cause remanded.

A Will May be Made on Distinct Papers, if they are connected by their internal sense, or by a coherence or adaptation of parts: Wikoff's Appeal, 15 Pa. St. 281, 53 Am. Dec. 597. But see, in this connection, Matter of Andrews, 162 N. Y. 1, 76 Am. St. Rep. 294, 56 N. E. 529.

The Attestation Clause to a Will is not absolutely necessary to its validity: Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec. 225; Berberet v. Berberet, 131 Mo. 399, 52 Am. St. Rep. 634, 33 S. W. 61.

A Will Must be Subscribed by Two Witnesses at least: Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Simrell's Estate, 154 Pa. St. 604, 35 Am. St. Rep. 864, 26 Atl. 599. Compare Lindsay v. McCormick, 2 A. K. Marsh. 229, 12 Am. Dec. 387; Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395; Scott's Estate, 147 Pa. St. 89, 30 Am. St. Rep. 713, 23 Atl. 212.

A Will is not Revoked by an unexecuted intention on the part of the testator to revoke it. An express revocation can be accomplished only by a union of revocatory act and intent: See the monographic note to Graham v. Burch, 28 Am. St. Rep. 344-362.

The Revocation of a Will cannot be Shown by the declarations of the testator alone: Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591, 41 Atl. 393. And they are never admissible as evidence of a revocation unless connected with some revocatory act, and tending to show that its purpose was or was not revocatory: See the monographic note to Graham v. Burch, 28 Am. St. Rep. 361.

Wills—Proof of.—Where a will is signed by the testator's mark, and the subscribing witnesses are dead, proof of their handwriting is a compliance with the law as to due execution; and it need not be proved that the testator had the will read over to him, or was informed of its contents, before he signed it: *Scott v. Hawk*, 107 Iowa, 723, 70 Am. St. Rep. 228, 77 N. W. 467. If the witnesses cannot be found, their handwriting may be proved, and the jury left to determine whether, from all the circumstances, the will was published with the requisite formalities: *Pearson v. Wightman*, 1 Mill Const. 836, 12 Am. Dec. 636.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

ESTATE OF MAHONEY.

[133 Cal. 180, 65 Pac. 389.]

CONSTITUTIONAL LAW—DENIAL OF EQUAL PRIVILEGES.—AN AMENDMENT TO A COLLATERAL INHERITANCE TAX LAW, undertaking to exempt resident nephews and nieces, violates section 2, article 4, of the federal constitution, concerning equal privileges and immunities, and also section 1978 of the United States Revised Statutes, concerning an equal right to inherit property. All nieces and nephews therefore remain subject to the tax as they were before the attempted amendment. (pp. 156, 157.)

James Gartland, for the appellants.

Tirey L. Ford, attorney general, William M. Abbott, deputy attorney general, and J. D. Sullivan, for the respondent, A. C. Freese, public administrator.

180 GRAY, C. The decedent left all his estate by will to his ten nephews and nieces, all of whom are nonresidents of the state of California, three of them residing in the state of New York and seven in Ireland. Seven of the said nieces and nephews appeal: 1. From that portion of the decree of final distribution herein which deducts five per cent from their respective distributive shares for collateral inheritance tax; and 2. From that portion of said decree which deducts a further sum of one dollar and ninety cents on each one hundred dollars for taxes claimed to be due on said estate.

1. Appellants contend that legacies to nephews and nieces are exempt from the collateral inheritance tax, whether they reside in this state or not. This contention cannot be upheld without a violation of the clearly expressed intention of the legislature.

The collateral inheritance tax law of this state, as it originally existed, is to be found in the statutes of 1893, page 193. It provided that all property of an estate valued at ¹⁸¹ five hundred dollars or more, which shall pass by will, or by the interstate laws of this state, other than to or for the use of certain relatives of the decedent named in the statute, shall be subject to the said tax. Nephews and nieces are not named among the relatives who are exempt from the tax. The act was amended in 1897, however, so as to exempt "nieces and nephews when a resident of this state," from the said tax: See Stats. 1897, p. 77. In so far as the statute as thus amended affects the questions involved in this case, it reads as follows:

"Section 1. After the passage of this act, all property which shall pass by will, . . . other than to the use of his or her father, mother, husband, wife, lawful issue, brother, sister, and nieces or nephews when a resident of this state, . . . shall be and is subject to a tax of five dollars on every one hundred dollars of the market value of such property, . . . for the use of the state; . . . provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax."

In 1899 the legislature again amended the said act, and left out the clause exempting nieces and nephews from the tax. The present case rests upon the law as it stood prior to this last amendment, and as it was amended in 1897. The language of the statute as amended in 1897 shows that it was the purpose of the framers of the law that nieces and nephews nonresident of the state should be subject to the tax; and if, as contended for by appellants, we eliminate from the statute the clause, "when a resident of the state," and leave the words, "and nieces and nephews," we establish a law as to nieces and nephews nonresident of this state, in direct opposition to the apparent legislative intent. This we may not do. Where there are two provisions in a statute, the one constitutional and the other one not, the unconstitutional provision may be rejected and the other stand, but here there is but one provision in question, and, being clearly unconstitutional, it should be rejected as a whole, and held invalid.

In *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. Rep. 988, it was held that a section of the Georgia code which reads as follows: "Any person, master, or commander of a ship or vessel bearing toward any of the ports or harbors of this state, except coasters in this state, and between the ports of this state, and those of South Carolina, and between the ports of this state and

those ¹⁸² of Florida, who refuses to receive a pilot on board, shall be liable, on his arrival in such port in this state, to pay the first pilot who may have offered his services outside the bar, and exhibited his license as a pilot, if demanded by the master, the full rates of pilotage established by law for such vessel," conflicts with the constitution of the United States, and is annulled and abrogated by the provision in section 4237 of the Revised Statutes, that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

We quote from the opinion of the court by Mr. Justice Matthews, as follows: "It was held, however, by the supreme court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of section 1512 of the code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes."

In *People v. Perry*, 79 Cal. 105, at page 115, 21 Pac. 426, the court said: "But we know of no precedent for holding that a clause of a statute, which, as enacted, is unconstitutional, may be changed in meaning in order to give it some operation, when admittedly it cannot operate as the legislature intended. This would, it seems to us, be making a law, and not merely correcting an excess of authority."

¹⁸³ Again, in *Cooley on Constitutional Limitations*, at page 211, the author says: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet

be perfectly distinct and separable, so that the first may stand though the last fall. The point is, not whether they are contained in the same section—for the distribution into sections is purely artificial—but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion.”

Authorities might be multiplied, all showing that a statute cannot, because it is in conflict with the constitution, be so limited or altered by the court as to make a law beyond or contrary to the apparent purpose of the legislature. In *re Stanford's Estate* (as decided in department), 54 Pac. 259, is not an authority upon the question here discussed, because a rehearing in that case was had, and a conclusion differing from that of the department, and based on different grounds, was reached by the court in bank: *Estate of Stanford*, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462.

We are of the opinion that the amendment of 1897 of the collateral inheritance statute, so far as it relates to nieces and nephews, is in conflict with the provisions of section 2, article 4 of the constitution of the United States, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, as well as with section 1978 of the United States Revised Statutes, providing that all citizens of the United States shall have the same right in every state as is enjoyed by the white citizens thereof to inherit property, and for that reason the amendment in that respect is void, and should be disregarded, thus leaving nieces ¹⁸⁴ and nephews subject to the collateral inheritance tax, as they were before said attempted amendment.

2. It appears that the estate consisted entirely of money, and that it had been kept on deposit by the executor with the California Safe Deposit and Trust Company, and it is contended that it was the duty of the assessor to assess the money to said

trust company, and it was the duty of said company to pay the tax thereon, and it will be presumed that the assessor performed his official duty. It is not necessary to determine any branch of this contention. The trust company was not a party to the proceedings, and its rights and duties could not therefore be determined in the matter. There is no showing in the bill of exceptions that the taxes in question had been paid by anybody, and the last order of the court made nunc pro tunc shows that taxes to the amount of one dollar and ninety cents on each one hundred dollars are claimed to be due upon said estate, and it is ordered by the trial court that the administrator retain that amount in his possession. It will not be presumed that the taxes have been paid, in the absence of a showing to that effect; and sections 3752 of the Political Code and 1669 of the Code of Civil Procedure make it the duty of the court to see to it that the taxes are paid. On the record before us we can see no error in the action of the court directing the administrator to retain the amount of the taxes claimed.

For the foregoing reasons we advise that the portions of the decree appealed from be affirmed.

Smith, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the portions of the decree appealed from are affirmed.

Garoutte, J., Henshaw, J.,
Van Dyke, J., McFarland, J.,
 Temple, J.

The Constitutionality of Collateral Inheritance Tax Laws is considered in the monographic note to *State v. Hamlin*, 41 Am. St. Rep. 580-585. A succession tax must be uniform as to persons of the same class. One cannot be charged a greater percentage on his legacy than another of the same class, because his legacy is larger: *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653, 45 S. W. 245. And a statute imposing such a tax in certain cases only is unconstitutional: *Estate of Cope*, 191 Pa. St. 1, 71 Am. St. Rep. 749, 43 Atl. 79. An inheritance tax law, excluding from its operation real property and laying the tax upon inheritance of personalty, exempting those whose property is exempt from taxation, allowing a larger exemption to lineal than to collateral heirs, and not taxing the excess of property received above a uniform exempted sum, is unconstitutional: *Drew v. Tift*, 79 Minn. 175, 79 Am. St. Rep. 446, 81 N. W. 839.

DOWNING v. RADEMACHER.

[133 Cal. 220, 65 Pac. 385.]

DIFFERENT WRITINGS CONSTITUTE BUT ONE INSTRUMENT if executed contemporaneously, and one is the consideration for the other. Each must be read as though it referred to the other and expressly incorporated its terms. (p. 162.)

A CONVEYANCE IS SUBJECT TO A CONDITION if it is of two-thirds of a mine, and is in consideration of the agreement of the grantee that he will take exclusive possession, work the mine, and render the grantor one-third of the gross proceeds. The equities of the grantor are the same as if he had leased the mine to be worked for a share of the proceeds. (p. 163.)

VENDOR AND VENDEE—PURCHASER WITH NOTICE.—If an interest in a mine is conveyed in consideration of the agreement of the grantee that he will take exclusive possession, work the mine, and render the grantor a share of the proceeds, every subsequent purchaser having notice of such agreement acquires title subject to the condition implied thereby. (p. 163.)

EQUITABLE TITLE—RELIEF WHICH MAY BE GRANTED.—In an action to determine conflicting claims to a mine, two-thirds of which has been conveyed in consideration of the agreement of the grantee that he will take exclusive possession, work the mine, and render a share of the proceeds to the grantor, neither the grantee nor his successors in interest with notice are entitled to a decree quieting their title. On the other hand, a decree should be entered against them and in favor of such grantor and his successors in interest declaring that the mine is held subject to such agreement. (p. 165.)

T. M. Osmont, for the appellants.

J. W. Ahern and Louttit & Middlecoff, for the respondents.

222 TEMPLE, J. This appeal is taken by defendants Rademacher and Osmont from a decree quieting the title of plaintiff to thirty-two sixtieths, and of defendant Middlecoff to eight-sixtieths, of a certain mining claim.

Rademacher was, on the eleventh day of January, 1897, the owner of a certain mine in the Randsburg district, in this state. On that day he conveyed an undivided two-thirds interest in the mine to the plaintiff, and contemporaneously with the execution of the deed, and as the sole consideration for the conveyance. Downing delivered to Rademacher his agreement in writing. It was an agreement inter partes, Downing being party of the first part, and recited the contemporaneous execution of the deed and also as follows: "Now, for the purpose of working said mine, said parties agree as follows: Said party of the first

part shall have the exclusive right to work and mine upon said mining claim, and mine thereon in any way he shall see fit. He shall mill and reduce all the mineral ore taken out of the said mine by him, and deliver to said party of the second part one-third of all of the gold or other minerals taken from said ore by said first party, free of cost, and expense to the party of the second part." The contract proceeds to specify that Downing shall have certain rights as to water owned by Rademacher, and the privilege of selecting the mill at which ores are to be milled, and of erecting mills upon land claimed by Rademacher. It provides, also, that Downing shall secure Rademacher against the claims of certain named persons, and shall have control, for Rademacher, of a lawsuit then pending.

The suit is an action to quiet title, and a cross-complaint was filed by defendants, Rademacher and Osmont, charging plaintiff and defendant Middlecoff with fraud. In the cross-complaint it was also charged that Downing never intended to mine said property, but procured the deed with intent to acquire two-thirds of the mine without consideration. It is averred that he has failed efficiently to prosecute the work of developing and working the mine, and that work has ceased upon the same. The cross-complainants, apparently uncertain as to the remedy to which they may be found entitled, have made a very full statement of alleged facts, and have demanded relief in several forms.

The defendants in the cross-action have answered, fully denying the charges of fraud, and generally the alleged equities²²³ of the cross-complainants. It may be considered that the contract entered into when the deed was made was the sole consideration for the deed. It is also admitted that soon after Downing received his deed he conveyed eight-sixtieths of the mine to Middlecoff, and subsequently conveyed the entire property to one Hyde, by a deed absolute on its face, but which deed was in fact simply a mortgage given to secure an indebtedness. The court so finds, but Hyde was not made a party to the suit, and the adjudication does not, therefore, conclude him.

The court found that the charges of fraud were not sustained, but the facts constituting the transaction are left substantially as stated. The court entered a decree quieting the title of Downing and Middlecoff, and adjudging them to own the interests respectively claimed by them, in fee, against Rademacher and Osmont, and all persons claiming or to claim under them. The decree deprives Rademacher of all equities in reference to the two-thirds interest conveyed by him to Downing, and determines that Rademacher conveyed away two-thirds of his mine for the

personal undertaking of Downing, that if he should work the mine he would give Rademacher one-third of all he should get, clear and free of expense to Rademacher; also, that Downing may sell his two-thirds, and the grantees can work the mine, and, under the rule in *McCord v. Oakland etc. Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863, not be chargeable with waste; and since Rademacher has by his contract given to Downing the exclusive right to work the mine, he could not offer to work the mine with the grantees of Downing, and therefore could not entitle himself, as against such grantees, to any portion of the proceeds of the mine. They would get the whole mine, instead of two-thirds, although Rademacher might possibly have a personal demand for an amount equal to one-third of the proceeds against Downing. But a result less favorable to Rademacher may be worked out. Middlecoff may commence a suit to have the mine partitioned, and would be entitled to his decree. The property, being incapable of division, may be sold, and Rademacher, at the best, would get one-third of the proceeds. In other words, according to the decree, he did not sell, but he gave away, two-thirds of his property.

He cannot compel Downing to specifically perform his contract, ²²⁴ and if, as a matter of law, he could do so, that could, under the terms of the decree, be prevented by the possible action of Middlecoff. In an action for damages, nominal damages only could be recovered. No actual damage could be proven.

There is here no question of innocent purchasers without notice. The deed and the agreement constitute one instrument, and must be read as though each referred to the other and expressly incorporated its terms. And, in legal effect, what do they amount to? As between the parties, at all events, there is no such magic in a conveyance of a title in fee which can be used to do an owner out of his property. Under this contract and deed, all Downing acquired was the right to work the mine in his own way, on condition that he deliver to Rademacher one-third of the valuable minerals obtained. The conveyance was, in effect, subject to this condition.

Respondent contends that the deed is not at all subject to the agreement, and that Rademacher had no equitable or other claim upon Downing's two-thirds interest, and to that effect is the judgment of the court. Upon this point counsel rely almost entirely upon the authority of *Hartman v. Reed*, 50 Cal. 485, and *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382. In *Hartman v. Reed*, 50 Cal. 485, the remarks quoted were not made with reference to anything there at issue. That

the interest passed to Crosby was there admitted by all parties, but it was claimed that Crosby's title was barred by limitation, and Hartman had obtained a deed from Olvera which purported to convey to him the same interest Olvera had previously conveyed to Crosby. The effect of that deed was the only matter litigated in that case. But the remark has been quoted as authority in other cases, and it may be admitted that as a proposition of law it is sound. The analogy of that case to this is very slight. There, a deed was made in payment for legal services, which it was claimed had not been rendered. The grantor did not seek to avoid the deed for failure of consideration. It was simply said the contract of Crosby to render service was a sufficient consideration for the deed.

Here, the consideration of the deed is not simply the agreement to perform service. The purchaser was given exclusive possession of the mine, and, as payment for his interest, agreed that he would render to the vendor one-third of the gross proceeds ²²⁵ obtained by working the mine. It is like a conveyance made of a farm for one-third of the crops which thereafter should be produced. Suppose such a contract could be made, it would amount to a lease, and would imply that the grantee, or his assignees, should farm the land, and, no doubt, if they refused to perform, the land could be recovered. This conveyance was for a share in the proceeds of the mine, and is in every way analogous to the case supposed. The technical ideas in regard to leasehold estates do not attach to this, but the equities are the same, and so are the implied obligations to work the mine, that the consideration agreed upon may be paid. A similar comparison may be made with *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382. And in these cases, also, if an action for damages had been brought, something more than nominal damages could have been proven. Here the consideration for the deed was a proportionate share of the proceeds of the mine, which, of course, could not be determined until the mine had been worked out. This fact alone is sufficient to show that the grant of the mine was conditional. Rademacher had no possible remedy, except upon the theory that Downing's title was conditional. He did not intend to give his property to Downing without consideration, nor did Downing intend to get it for nothing. There is no other possible mode in which the agreed price can be paid. A sale of an interest in the mine, unless the purchaser takes subject to the equities of Rademacher, would be very likely to deprive Rademacher not only of all remedy, but of his property. Upon this ground Rademacher has a clear equi-

ty with reference to the portion of the mine conveyed to Downing. This equity binds Downing, and all who purchase from him with notice.

Upon this subject the case of *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698, is directly in point. Richter executed to his son a warranty deed for a farm, for an expressed consideration of one thousand dollars. The real consideration was a contemporaneous agreement in writing, by the terms of which the son agreed to support his father so long as he should live. A few months afterward the son refused to perform this contract. After a demand for reconveyance, the father brought suit to compel it. The defense there was the same as here, that the consideration for the deed was the agreement, and the only ²²⁰ remedy the father had was to sue upon it. The contract purported to be a mortgage, though the court held it could not be enforced as such. It was said: "True, neither the deed nor the mortgage state in express terms that the estate is granted upon condition, but the word 'condition' is not necessary to the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description: *Stillwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240. In the construction of deeds, as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties, as such intention may be gathered from the language of the whole instrument. The intent is what the law applies itself to in deeds: *Watters v. Bredin*, 70 Pa. St. 235. If from the nature of the acts to be performed by the grantee, and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is upon condition. This is especially so when the grantor has reserved no other effectual remedy for the enforcement of performance on the part of the grantee."

The court cites the case of *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642. That was a similar case, except that the son agreed to deliver to his father a portion of the crops. It was held that a condition subsequent was created, although the writing did not expressly so provide. After citing *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642, the court proceeds to enlarge upon the proposition that there was no other remedy, and concludes that this fact is persuasive of the conclusion that it was intended as a condition attaching to the estate. To the like effect is *Wilson v. Wilson*, 86 Ind. 472.

A similar question was elaborately considered by the supreme court of Illinois in *Manning v. Frazier*, 96 Ill. 279. This controversy arose upon a conveyance of all the coal in a certain tract of land, with express license to the grantees to enter and mine for the same, paying a stipulated price per ton for the coal removed. The court held that here was a conveyance of land, and that the vendor had an equitable lien upon the entire interest conveyed for money due under the contract.

The principle involved is somewhat analogous to the familiar ²²⁷ case where one sells part of his land and attempts to restrict the use of the part sold by his vendee for the benefit of the portion retained. This matter was elaborately considered by Judge Bigelow in *Whitney v. Union Ry. Co.*, 11 Gray, 359, 71 Am. Dec. 715. The question was, how far such restrictions are binding on grantees of the original grantee. It is held that the restriction is binding on those who take with notice. He says: "In like manner, by taking an estate from a grantor with notice of valid agreements made by him with the former owner of the property concerning the mode of occupation and use of the estate granted, the purchaser is bound in equity to fulfill such agreements with the original owner, because it would be unconscientious and inequitable for him to set aside and disregard the legal and valid acts and agreements of his vendor in regard to the estate of which he had notice when he became its purchaser." He further states that the form of the agreement is immaterial. It need not be a covenant running with the land. It is an equity which attaches itself to the land sold for the benefit of the land retained. The matter was considered in fixing the price. It was a part of the contract of sale. The vendee gets the land at a lower price because of the burden, and so do his grantees. They are continually paying for the land.

The matter is elaborately discussed in a note to *Ladd v. Boston*, 21 Am. St. Rep. 481, where very numerous authorities are cited and considered.

The respondents are not entitled, under the findings, to have their titles quieted as against Rademacher and his grantee, appellants here, but said appellants are entitled on said findings to a decree declaring that Downing took, and he and his grantee now hold their interests in said mining claim, subject to the contract entered into by Downing and Rademacher, and it is ordered that the decree be modified accordingly.

McFarland, J., Henshaw, J., Garoutte, J., Van Dyke, J., and Beatty, C. J., concurred.

What Words Create a Condition Subsequent are considered in the monographic note to *Ecroyd v. Coggeshall*, 79 Am. St. Rep. 747-769. The avoidance of deeds for breach of a condition subsequent, is discussed in the monographic note to *Cross v. Carson*, 44 Am. Dec. 743-759. Where the condition of a deed is one dollar and the execution of an agreement by the grantee to pay the grantor, during his life, one-third of the crops on the premises, the performance of this latter agreement is a condition subsequent. The failure to pay the one-third yearly produce will work a forfeiture of the estate, and equity will interfere to set aside the conveyance: *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642.

Covenants Restricting the Use of Land may be enforced in equity against all who take the estate with notice thereof: *Whitney v. Union Ry. Co.*, 11 Gray, 859, 71 Am. Dec. 715. See the extended discussion of covenants of this kind in the monographic note to *Ladd v. Boston*, 21 Am. St. Rep. 484-508.

What Covenants Run With the Land are considered in the monographic note to *Geiszler v. De Graaf*, 82 Am. St. Rep. 664-690.

Covenants—Construction and Consideration.—In independent covenants, the reciprocal covenants themselves are the consideration: *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741. Where a father executes a deed to his son upon consideration of one dollar and of the son's executing a bond covenanting to cultivate the land in a husband-like manner, and to deliver to the father one-third of the yearly produce, the deed and bond are to be treated as constituting a single instrument, and are parts of one contract: *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642.

MOORE v. RUSSELL.

[133 Cal. 297, 65 Pac. 624.]

MORTGAGES.—SLIGHT MISTAKES in the copy of a note embodied in the mortgage given to secure it are not fatal to the validity of the mortgage, when it is apparent that the debt and note sued on are the debt and note referred to in the mortgage. (p. 168.)

ESTATES OF DECEDENTS—PRESENTATION OF MORTGAGE AGAINST.—Under a statute providing that, in presenting a mortgage to an administrator for allowance, it shall be sufficient to describe it by reference to the date, volume, and page of its record, a presentation making such reference, and stating that the mortgage is on realty in a certain county, and was given to secure a note, a copy of which is contained in the presentation, is good, even if anything more is required than a reference to the recordation. (p. 168.)

RES JUDICATA.—A JUDGMENT DISMISSING AN ACTION, without prejudice to the plaintiff, is not a bar to a subsequent action. (p. 168.)

LIMITATIONS OF ACTIONS—NOTE WHICH HOLDER HAS OPTION TO DECLARE DUE.—The holder of a note, who has, upon nonpayment of the interest due, the option of consider-

ing the whole amount of principal and interest due, prior to the maturity of the note, does not exercise such option, after default in the payment of interest and before the maturity of the note, by presenting a claim against the estate of the deceased maker for the "amount due" at the date of presentation. (p. 169.)

ESTATES OF DECEDENTS—LIMITATIONS ON CLAIMS NOT DUE WHEN PRESENTED.—If a statute provides that the holder of a rejected claim must sue thereon "within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred," he may sue on his claim within two months after maturity, though more than three months have elapsed since its rejection. (p. 169.)

NEGOTIABLE INSTRUMENTS—WAIVER OF RIGHT TO TREAT AS DUE.—Though the holder of a note has exercised his option of considering the whole amount due for nonpayment of interest, he may subsequently waive this right, and if he does so, the statute of limitations does not run against him prior to the date originally fixed for the maturity of the note. (p. 169.)

A JUDGMENT AGAINST AN ADMINISTRATOR FOR ANY DEFICIENCY, after a sale of mortgaged premises, must provide that it be paid in the due course of administration. (p. 170.)

W. J. McIntyre and Charles R. Gray, for the appellant.

Purington & Adair, for the respondent.

298 McFARLAND, J. This is an appeal by defendant Zaddock H. Russell, administrator, from a judgment rendered in plaintiff's favor upon a certain note and mortgage for eight hundred dollars and interest.

No defense is made on the real merits of the case—that is, it is not pretended that the mortgage was not given to secure a just debt. The attacks on the judgment are based on certain alleged irregularities and failures to comply with statutory provisions; and it may be said that these attacks seem to have been invited by a spirit of carelessness, which accompanied most of respondent's acts in the premises, from and including the drafting of the mortgage to the entry of the judgment. We think, however, that none of appellant's positions are really tenable, except as to the form of a certain part of the judgment.

On November 18, 1898, the note and mortgage in question were made and executed to plaintiff by William Russell, since deceased, and his wife, Ruth M. Russell. The principal of the note was eight hundred dollars, payable seventeen months after date, with interest at eleven per cent per annum, payable annually. There was a provision in the note that if any interest should not be paid when due, "the whole amount of principal and interest shall thereafter be due and payable, at the option of the holder of said note, to be exercised at any time within ninety

days after any such default." William Russell died on the fourth day of July, 1899, and the defendant Zadock became his administrator on August 14, 1899. The first interest became due on November 18, 1899, and was not paid, and no principal or interest had been paid when the action was commenced. On January 18, 1900, plaintiff presented his claim on the note and mortgage to the administrator, who rejected the same. The action was commenced on June 12, 1900—within two months after the note, on its face, matured, but not within three months after the presentation of the claim.

1. The note and mortgage were made at the same time. It is declared on the face of the mortgage that it is given "as security ²⁹⁹ for the payment to said mortgagee of the sum of eight hundred dollars, in gold coin of the United States, with interest thereon according to the terms of a certain promissory note in words and figures following, to wit." Then follows what is an exact copy of the note, except in these two particulars: 1. The word "administrator" is inserted after the name of the payee, "Moore"; and 2. At the end of the copy the name of "Ruth M. Russell" is omitted. Appellant contends that these two mistakes in the copy are fatal to the validity of the mortgage as security for the note sued on; but the point is not maintainable. He speaks in his briefs of the "first" and the "second" note; but there is nothing in the record to warrant a pretense that there were two notes. The question here is as to the identity of the debt and note secured; and it is quite apparent, notwithstanding the two slight mistakes in the copy, that the debt of eight hundred dollars and the note sued on are the debt and the note referred to in the mortgage.

2. Appellant contends that there was no valid presentation of the mortgage to the administrator, because, as he says, the respondent in the presentation did not "describe" the mortgage. This contention is based on section 1497 of the Code of Civil Procedure, which provides that in the case of a mortgage or of a lien which has been recorded, "it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record." In the case at bar the mortgage was recorded, and the presentation referred to date, volume, and page of its record; but appellant contends that it was not good, because the mortgage was not otherwise described. The presentation, however, shows that the mortgage was on real property situated in Riverside county, California, and was given to secure a note, a copy of which is contained in the presentation. This was a sufficient compliance with the section of the code, even if anything

more is required than a reference to the recordation. This contention, therefore, cannot be maintained.

3. It is contended that this action was barred by the judgment in a previous action, which was brought by plaintiff against the defendants on the note and mortgage sued on in this present action; but all that appears on this subject is, that on motion of the plaintiff therein, and with the consent of one of the defendants therein (Ruth M. Russell), the action was by the judgment of the court dismissed, "without prejudice ³⁰⁰ to the right of the plaintiff to bring a new action on the same cause of action." Nothing else appearing, there can be no valid contention that the dismissal of the former action was a bar to the present one.

4. The most plausible contention of appellant is, that the action was barred by section 1498 of the Code of Civil Procedure, because it was not brought within three months after the presentation of the claim; but this contention cannot be maintained. That section provides that in the case of a rejected claim the holder must bring suit "within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred." Appellant contends that the respondent's presentation of the claim on January 18, 1900, within three months after the first annual interest had become due and remained unpaid, was a final and conclusive exercise of his option, under the terms of the note, to consider the whole amount of the principal and interest due, and that, therefore, he should have brought his suit within three months thereafter. In the first place, we do not think that the presentation of the claim can be considered as the exercise of the option in question. It certainly was not an express declaration to that effect; it was merely a presentation of the facts constituting his claim. The language of the claim was this: "To amount due at this date on a certain promissory note dated November 18, 1898, made by said William Russell and Ruth M. Russell to H. B. Moore, payable seventeen months after date, with interest at the rate of eleven per cent per annum, nine hundred and four dollars and twenty-eight cents," followed by a copy of the note. The words, "amount due at this date," do not necessarily mean more than that the principal of the note was so much, and the interest so much, and that none of it had been paid; it does not mean, necessarily, that the whole amount was then due, in the sense of being payable and suable, and that respondent intended to bring suit on that theory. But even if that intent could be attributed to him from the fact of the pres-

entation, he was not bound to pursue that intent. It is firmly established that an option of that character is a mere penalty put on the maker, in favor of the holder of the note, which the latter may waive, and that even his express declaration of an election to exercise the option does not put it out of his power to waive it: *California Sav. etc. Soc. v. Culver*, 127 Cal. 112, 59 Pac. 292; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *Belloc v. Davis*, 38 Cal. 242.

In *California Sav. etc. Soc. v. Culver*, 127 Cal. 112, 59 Pac. 292, where the note was like the one in the case at bar, the plaintiff had exercised his option in the most positive way, by bringing an action which he afterward dismissed; and it was held that he could waive his option, even after having thus exercised it, and that, as against a subsequent action, the statute of limitations did not commence to run from the time of the said exercise of his option, but ran only from the maturity of the principal of the note. And so in the case at bar, even if the presentation of the claim could be construed as an assertion of his right under the option, he was not compelled to continue to exercise it by bringing suit before the maturity of the note. His claim was not one "then due," within the meaning of section 1498 of the Code of Civil Procedure; and as this action was brought within two months after the maturity of the note, it was not barred by limitation.

The foregoing views dispose of all the points made by appellant which call for notice, except the contention that the part of the judgment which gives a recovery against the administrator for any deficiency after sale of the mortgaged premises should have provided that it be paid in due course of administration. This contention must be sustained. Section 1504 of the Code of Civil Procedure expressly provides that in case of a judgment against an executor or administrator, "the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due." The judgment in the case at bar must therefore be modified in this respect.

The cause is remanded, with direction to the court below to modify the judgment by adding to the clause of the same, immediately preceding the description of the mortgaged premises, the words, "to be paid in due course of administration," and as thus modified the judgment will stand affirmed.

Temple, J., and Henshaw, J., concurred.

Res Judicata.—A judgment of nonsuit is not a bar to another action for the same cause: *Note to Cartin v. South Bound R. R. Co.*, 49 Am. St. Rep. 831.

WEST COAST SAFETY FAUCET COMPANY v. WULFF.

[133 Cal. 315, 65 Pac. 622.]

EXECUTION SALE OF CORPORATE STOCK.—A PURCHASER, at an execution sale, of the shares of a corporation, standing on its books in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him as such purchaser, if, at the time of the purchase, he acts in good faith and without notice that the outstanding certificate has been assigned or pledged. (p. 171.)

A PLEDGEE OR ASSIGNEE OF CORPORATE STOCK CAN PROTECT HIMSELF AGAINST a purchaser at an execution sale only by causing a reissue of the certificate, or by serving notice on the corporation that he holds the certificate as such assignee or pledgee. (p. 171.)

CORPORATE STOCK.—IT IS NOT ESSENTIAL TO THE VALIDITY of an execution sale of shares of stock in a corporation that the sheriff have manual possession of the certificate at the time of the sale, or that he should deliver it to the purchaser. (p. 171.)

EXECUTION SALE OF CORPORATE STOCK—REMEDY OF PURCHASER.—After an execution sale of corporate stock pledged as collateral security, of which fact the purchaser had no notice, the pledgee may be compelled to surrender it so that it may be reissued to the purchaser, and this procedure applies to an execution issued out of a justice's court. (pp. 171, 172.)

F. A. Berlin, for the appellant.

Robert Ash, for the respondent Wulff.

A. L. Black, for the respondent company.

210 CHIPMAN, C. Plaintiff brought the action to compel defendants to answer and to cause their respective rights to certain shares of plaintiff company to be determined. The cause was tried on an agreed statement of facts, and defendant Wulff was adjudged to be "the holder and pledgee of certificate No. 61 for one hundred shares of the capital stock of the West Coast Safety Faucet Company, and entitled to have the same transferred on the books of said corporation to his name." Defendant Lake appeals from the judgment and from the order denying his motion for a new trial.

The essential facts were, that one Straut owned the shares in 1896, and the certificate stood in his name then, and ever since, on the books of the corporation. In October, 1896, he indorsed the certificate to defendant Wulff as collateral security, into whose possession it passed and has since remained. In 1897 defendant Lake brought an action against Straut in the justice's

court of the city and county of San Francisco, and caused a writ of attachment to issue therein, directed to the sheriff, who duly served the same upon the secretary of said corporation. Lake obtained judgment in January, 1898, and caused execution to issue thereon, and it was duly levied by leaving with the secretary of the corporation a copy of the writ, and a notice that the said stock was levied upon in pursuance of the writ. The sheriff duly sold the shares at public auction, pursuant to execution, in March, 1898, and Lake became the purchaser, and he thereupon made demand for a transfer of the shares and issuance of a certificate therefor to him. Wulff had not up to this time demanded any reissue of the stock to him, nor had he notified the corporation that he held the certificate as pledgee or otherwise. Lake first knew of the claim of Wulff, and that he held the certificate as pledgee, in January, 1899.

1. It is settled law in this state that one who purchases at execution sale shares of a corporation, standing on the books of the corporation in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him as such purchaser, if at the time of the purchase he acts in good faith, and without notice that the outstanding certificate has been assigned or pledged to some person other than the judgment debtor. In order that an assignee or pledgee of a certificate may protect his rights, as against a purchaser at execution ³¹⁷ sale, he must cause a reissue to him of a certificate, or he must serve notice on the corporation that he holds the certificate as such assignee or pledgee.

The decisions of this court on the question will be found in the following cases: *Weston v. Bear River etc. Co.*, 5 Cal. 186, 63 Am. Dec. 117; also, second appeal, 6 Cal. 425; *Strout v. Natoma etc. Co.*, 9 Cal. 78; *Naglee v. Pacific Wharf Co.*, 20 Cal. 530; *People v. Elmore*, 35 Cal. 653; *Parrott v. Byers*, 40 Cal. 614; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348, 45 Pac. 329. The last of these cases points out what must be done by the pledgee, where it is desirable to leave the stock standing in the name of the owner.

2. Respondent Wulff claims that in the suit of *Lake v. Straut*, in the justice's court, the plaintiff could, under subdivision 4 of section 542 of the Code of Civil Procedure, attach the interest of defendant, but that after judgment the plaintiff should have proceeded under sections 545 and 905 of the Code of Civil Procedure. The first of these sections re-

lates to the citation of the defendant, and any person having in his possession personal property belonging to the defendant, for the purpose of examining them respecting such property. Section 905 makes applicable to justices' courts sections 714 to 721 of the Code of Civil Procedure, inclusive, which latter relate to proceedings supplementary to the execution. Respondent's contention cannot be sustained. Section 688 of the Code of Civil Procedure expressly provides that shares in any corporation may be attached on execution, in like manner as upon writs of attachment. It was not necessary to the sale of Straut's interest in the shares that they should be in the hands of the sheriff to be personally delivered to the purchaser. The writ of execution is served as is the writ of attachment, which latter is served as directed by subdivision 4 of section 542 of the Code of Civil Procedure. This section and section 688 appear to treat the interest of the debtor in shares of corporations as personal property not capable of manual delivery. When the execution is served, the sale proceeds without manual possession of the certificate by the sheriff. He does not require such possession for the levy, as in the case of personal property under subdivision 3 of section 542 of the Code of Civil Procedure, nor is it ³¹⁸ necessary that he deliver the certificate to the purchaser at execution sale. The certificate might at the time be in the hands of the owner, but the levy and sale would entitle the purchaser to have a certificate issue to him, and for that purpose the court would, upon appropriate proceedings, compel the surrender of the original certificate, in order that it might be reissued to the purchaser. So, also, if it turned out that the certificate was in the hands of a pledgee, of which fact the purchaser in good faith had no notice, the pledgee could be compelled to surrender the certificate, that it might reissue to the purchaser. In some of the cases cited *supra*, the procedure was the same as in the present case, and sale was made without supplementary proceedings. It was so in *Weston v. Bear River etc. Co.*, 5 Cal. 186, 63 Am. Dec. 117; second appeal, 6 Cal. 425; also in *Naglee v. Pacific Wharf Co.*, 20 Cal. 530, and in *People v. Elmore*, 35 Cal. 653, and also, we think, in *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600. Of the regularity of the procedure we have no doubt.

As the case is here on an agreed statement of facts, there is no necessity for a new trial. The judgment and order should be reversed, with directions to enter judgment in favor of defendant Edward H. Lake.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed, with directions to enter judgment in favor of defendant Edward H. Lake.

McFarland, J., Temple, J., Henshaw, J.

The Pledge of Corporate Stock, and the rights and liabilities arising therefrom, are discussed in the extended notes to *State v. Bank of New England*, 68 Am. St. Rep. 542-547; *Griggs v. Day*, 82 Am. St. Rep. 715. A transfer upon the books of the corporation is not essential to the validity of the pledge, but the pledgee is entitled to have a proper entry of the transaction made upon the books for protection against purchasers or other third persons: *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348, 45 Pac. 829.

Execution.—Corporate stock pledged as collateral security and transferred on the books of the corporation to the pledgee cannot be sold on execution against the pledgor: *Felge v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 890, 77 N. W. 928.

PEOPLE v. GORDON.

[133 Cal. 828, 65 Pac. 746.]

EMBEZZLEMENT.—THE ESSENTIAL ELEMENTS of embezzlement are the fiduciary relation arising where one intrusts property to another, and the fraudulent appropriation of the property by the latter. (p. 175.)

EMBEZZLEMENT.—A CHARGE OF EMBEZZLEMENT IN THE LANGUAGE OF THE STATUTE is sufficient, at least on a motion in arrest of judgment, though it does not allege the circumstances of the felonious conversion. (p. 175.)

EMBEZZLEMENT — UNNECESSARY AVERMENTS.—AN INFORMATION FOR EMBEZZLEMENT, which states that the property was intrusted to the defendant as bailee, sufficiently shows a fiduciary relation, and it is not necessary to aver that the owner or bailor had demanded possession of the property and had been refused. (p. 175.)

EMBEZZLEMENT — CONVICTION FOR, IS NOT CONTRARY TO EVIDENCE OR INSTRUCTION, WHEN.—In a prosecution for the embezzlement of a diamond ring by a bailee, where the owner testifies that the defendant took it from her finger "before she knew it," and declared that he would have it fixed for her as an engagement ring; and that he never brought the ring back, but sold it, a conviction is not contrary to the evidence or an instruction that, if the defendant obtained the ring against the will of the prosecuting witness he should be found not guilty. It was the subsequent felonious conversion that constituted the embezzlement. (pp. 175, 176.)

EMBEZZLEMENT — JURISDICTION — UNOBJECTIONABLE EVIDENCE.—If property is intrusted to, and converted by, one who is tried in the county of such conversion for embezzlement, evidence of what took place in another county, when he

received the property, is not objectionable on the ground that it was without the jurisdiction of the court. (p. 176.)

EMBEZZLEMENT—INSTRUCTION AS TO LARCENY.—After full instructions, on a prosecution for embezzlement, as to what constitutes that crime, it is not prejudicial error to add an instruction as to what constitutes larceny. (p. 176.)

A. V. Scanlan, for the appellant.

Tirey L. Ford, attorney general, and A. A. Moore, Jr., deputy attorney general, for the respondent.

³²⁹ **CHIPMAN, C.** Defendant was convicted of embezzlement. He moved in arrest of judgment, which motion being denied, he moved for a new trial. This motion was also denied, and hence this appeal. There was no demurrer to the information. It is not contended that the evidence fails to support the verdict.

1. The motion in arrest of judgment is based upon the ground that the information does not charge a public offense. The information, it is conceded, is in the language of the statute (Pen. Code, sec. 507); but it is claimed that the information is fatally defective, in that it fails to set forth the facts relied on to constitute the embezzlement charged: Citing *People v. McKenna*, 81 Cal. 158, 22 Pac. 488. This was the case of an information charging fraud, under section 532 of the Penal Code. The complaint failed to aver any of the circumstances constituting the alleged fraud, although following closely the language of the statute. It was held bad, and not sufficient to sustain the conviction. There are obvious reasons why an indictment for obtaining money or other property under false pretenses should aver with particularity the facts relied upon to show fraud, and hence it is that it is insufficient to simply follow the language of the statute in such cases. But the rule of pleading is different, as the reason is different, in the case of embezzlement. The essential elements of embezzlement are the fiduciary relation arising where one intrusts property to another, and the fraudulent appropriation of the property by the latter: Pen. Code, sec. 503. The origin or particulars of the relation need not be stated: 2 Bishop's Criminal Law, sec. 323a. Section 507 of the Penal Code reads as follows: "Every person intrusted with any property as bailee, . . . who fraudulently converts the same or the proceeds thereof to his ³³⁰ own use, . . . with a fraudulent intent to convert to his own use, is guilty of embezzlement," etc.

It was alleged in the information that on a certain day the defendant "was, by one Pauline Hankozy, intrusted, as bailee, with certain personal property [describing it (a certain diamond ring) and giving its value], which said ring was then and there the personal property of said Pauline Hankozy, and thereafter [stating time and place] the said W. F. Gordon did willfully, unlawfully, and feloniously embezzle and fraudulently convert to his own use, . . . without the consent of the said Pauline Hankozy, contrary," etc. A similar information, in the case of embezzlement by an alleged agent, was held sufficient in *People v. Tomlinson*, 66 Cal. 344, 5 Pac. 505; in the case of a public officer, in *People v. Mahlman*, 82 Cal. 585, 23 Pac. 145, and *People v. Page*, 116 Cal. 386, 48 Pac. 326—in which cases there were demurrers. Stating that the property was intrusted to defendant as bailee sufficiently showed a fiduciary relation, and it was not necessary to allege the circumstances of the felonious conversion—especially so in the absence of a demurrer. Nor was it necessary to aver that the owner or bailor had demanded possession of the property, and had been refused, as is claimed by defendant. *People v. Wyman*, 102 Cal. 552, 36 Pac. 932, and *People v. Royce*, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524, stated a rule applicable to the evidence and not to the information.

2. It is contended that the verdict was in violation of the following instruction given by the court: "If you are satisfied that the defendant obtained possession of the ring mentioned in the information, against the will of the prosecuting witness, Pauline Hankozy, you should find a verdict of not guilty." The prosecuting witness testified that she first met defendant at Sonora (county not mentioned; there is such a place in Tuolumne county), and that she became engaged to him. She testified that defendant took the ring from her finger before she knew it, and then told her he would take it to San Francisco and have it fixed for her as an engagement ring, and would put some rubies in it, and would bring it back in nine days. "He never came back," but sold the ring in Stockton. Just what the witness meant by saying that the ring was taken "before she knew it" is not clear; but she seems to have acquiesced at the time. What defendant's intention was in taking the ring, and whether it was against the owner's will, were questions for the jury, on the evidence. The jury manifestly ³³¹ construed the evidence adduced, as well they might have done, as showing that defendant took the ring with Miss Hankozy's consent. It was the subsequent felonious conversion by defendant that consti-

tuted the embezzlement. The instruction was given at defendant's request, and the verdict was neither contrary thereto nor to the evidence.

3. The property was not received in San Joaquin county, but it appeared that it was converted in that county, and this was sufficient: *People v. Murphy*, 51 Cal. 376. The evidence was sufficient to warrant the jury in finding that the intent to embezzle the property was conceived in San Joaquin county. This answers defendant's objection to the testimony of Miss Hancozy as to what took place at Sonora, claimed by defendant to be without the jurisdiction of the court—i. e., in another county.

4. The court gave the following instruction: "The mere taking of property by one from another does not constitute larceny. To constitute larceny, such taking must be a felonious taking—a taking with the intent on the part of the taker then and there to steal the same." It is claimed that the instruction "had no place in a case like the present one." Defendant, in the instruction asked by him, already noticed, sought to show that there might be an unlawful taking which would not be embezzlement. In effect, it was to intimate that while the evidence in the case might show larceny or some other crime, it was not the crime charged. The court had instructed very fully as to what constituted embezzlement, and, no doubt out of abundant caution, added the above instruction, which could not have resulted to defendant's injury.

We discover no error in the judgment or order, and advise that they be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Van Dyke, J., Garoutte, J., McFarland, J.

Embezzlement.—An indictment for larceny after a trust, alleging that the accused was intrusted with specified money for the use and benefit of a person named, is not demurrable on the ground that the trust is not sufficiently set out: *Keys v. State*, 112 Ga. 392, 81 Am. St. Rep. 63, 37 S. E. 762. See, also, *Commonwealth v. Butterick*, 100 Mass. 1, 97 Am. Dec. 65. As to whether it is necessary to aver a demand, see the monographic note to *Calkins v. State*, 98 Am. Dec. 170. And consult this note, pages 152-172, on the sufficiency of indictments for embezzlement in general.

Embezzlement Consists in the Fraudulent Conversion of another's property by one to whom it has been intrusted: See the monographic note to *Calkins v. State*, 98 Am. Dec. 131. Consult this note, pages 126-174, for an exhaustive consideration of the offense of embezzlement.

IN RE BEGEROW.

[133 Cal. 849, 65 Pac. 826.]

CONSTITUTIONAL LAW—RIGHT TO SPEEDY TRIAL—
A party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important, or to prolong his imprisonment, without such trial, beyond the time provided by law. (p. 179.)

STATUTE FIXING REASONABLE TIME FOR BRINGING TO TRIAL—CONSTRUCTION OF.—A statute providing that the court must, unless good cause is shown to the contrary, order a prisoner to be discharged, where he has not been brought to trial within sixty days after the filing of the indictment or information, if it has not been postponed upon his application, fixes a reasonable time in which a defendant shall be brought to trial, and is mandatory. (pp. 179, 183.)

HABEAS CORPUS—DELAY IN BRINGING TO TRIAL.—Under the constitutional guaranty of a speedy trial, and a statutory provision that a defendant shall be discharged unless he has been brought to trial within sixty days after the filing of the indictment or information, if the trial has not been postponed upon his application, he is entitled to his discharge on habeas corpus whenever the sixty days elapse without a trial, there being no good reason for delay, and the defendant not consenting thereto. (pp. 181, 184.)

HABEAS CORPUS—DELAY AFTER MISTRIAL.—While a mistrial is not a trial, and may excuse delay in bringing a defendant to trial, yet, under a statute requiring him to be brought to trial within sixty days after the filing of the information, if he has had several mistrials, for failure of the jury to agree, and a delay of eighty-four days is allowed to elapse, after the last mistrial, without putting his case upon the calendar, he is entitled to his discharge on habeas corpus, where no excuse is given for the delay, and it was not caused by the defendant or with his consent. (pp. 178, 181, 184.)

B. A. Herrington and George W. Waldorf, for the petitioner.

250 **TEMPLE, J.** This is an application for a discharge from custody, on habeas corpus, by the petitioner, who is held under two informations filed in the superior court of Santa Clara county, upon two separate charges for murder. The informations were filed August 15, 1900. Since then defendant has been tried three times upon one charge, and once upon the other, and each trial resulted in a mistrial, because the jury failed to agree. The last jury was discharged March 6, 1901. Since that period neither case has been upon the calendar for trial. Eighty-four days had elapsed since the discharge of the last jury before this petition was filed. The delay was not caused by the defendant or with his consent. No witness for the pros-

ecution has been absent or ill. There are three departments in the superior court of Santa Clara county. During said eighty-four days one department has been occupied fifteen days only in the trial of criminal cases, and the other two have not been engaged in criminal trials at all.

On the 20th of May, 1901, and after more than sixty days had elapsed since the discharge of the last jury, the petitioner applied to the superior court, upon notice, for a dismissal of the prosecutions against him, and, upon the hearing, showed by competent evidence all the facts above set forth. No showing to the contrary was made. No reason was shown at that time, or at any time, why the cases had not been brought to trial, but the motion was nevertheless denied.

The return shows, simply, that the sheriff held the defendant ~~351~~ by virtue of a commitment made by a justice of the peace, dated August 9, 1900. It is conceded that the facts are correctly stated in the petition.

Section 1382 of the Penal Code provides that the court, unless good cause is shown to the contrary, must order the prosecution to be dismissed in the following cases: 1. If an indictment or information has not been filed against him within thirty days after he was committed to answer; 2. When, if the trial has not been postponed upon his application, he is not brought to trial within sixty days after filing the indictment or information. The constitution (article 1, section 13) guarantees to every person charged with crime a speedy public trial.

In *People v. Morino*, 85 Cal. 515, 24 Pac. 892, this court said: "The legislature has provided what shall constitute a reasonable time within which a defendant shall be brought to trial"; and then, after setting out section 1382 of the Penal Code, proceeds: "The court below, in denying the defendant's motion, said: 'The question you raise I have considered before, and, under my construction of the law, it is discretionary, and not mandatory, and I will presume the court was engaged in the trial of other causes.' We think this is not a proper construction of the law. A party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important, or to prolong his imprisonment, without such trial, beyond the time provided by law. The statute is imperative. The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed. Here, no cause for delay was shown. It was enough for the defendant to show that the time fixed by the statute, after information filed, had expired, and that the case had

not been postponed on his application. If there was any good cause for holding him for a longer time without a trial, it was for the prosecution to show it. The court could not presume it. Under the facts as shown, the case should have been dismissed, and it was error to deny the motion."

That case has never, so far as I know, been called in question, and it decides some important points.

1. The statute is a construction of the constitutional provision, so far as to indicate what is a reasonable time within which the case should be brought to trial, in order that the constitutional guaranty may be kept. And it may be fairly interpreted to mean that this guaranty is violated whenever sixty ³⁵² days is allowed to elapse without a trial, there being no good reason for delay, and the defendant not consenting thereto.

2. And, in the second place, it decides that it is sufficient for the defendant, in order to make out his case upon a motion for a dismissal in the trial court, to show that he has been detained without a trial for more than sixty days. Upon such showing the court should dismiss the case, unless good cause for detaining the defendant and for continuing the prosecution is shown on behalf of the people. There is no presumption in such case, at least in the trial court, that the court has acted regularly, or that good cause in fact exists.

It is well to remember that this case involves fundamental rights, and is of universal interest. Around those rights the English have waged their great battle for liberty. Without the narration of the conflicts to which they have given rise, the history of the English people would be a dull affair. The right of the government with reference to persons accused of crime has been, and is yet, a matter of great consideration. It led to the agitation which wrung from power the Great Charter, the Petition of Right, and the Habeas Corpus Act. All the great achievements in favor of individual liberty, of which the English people are so justly proud, may be said to have come through contests over the rights of persons imprisoned for supposed crime.

And justly it is deemed a matter of the utmost importance. The government cannot take property from the meanest inhabitant, without just compensation paid or tendered in advance; but it takes his liberty, which it has been justly said is to some extent to take his life, upon a mere charge of crime. This is necessary, that society may be protected. But necessity is the only excuse, and to imprison beyond what is absolutely necessary

is tyrannous and oppressive. And this is precisely what the state has covenanted with each inhabitant that it will not do. In this one provision of the constitution the state speaks as did the English sovereign in the Great Charter in 1215. It is an assurance from the sovereign, "*Nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.*"

Hallam says, referring to this: "From the era, therefore, of King John's charter it must have been a clear principle of our constitution that no man can be detained in prison without trial": 2 Hallam's Middle Ages, 342.

³⁵³ The state, then, in a criminal case, is not only a party litigant, and, as such, bound to use diligence to prepare for trial, on pain of having its case dismissed, but it holds the defendant in custody upon this express guaranty for a speedy trial, and that it will not continue to hold him, save under a legal verdict declaring him guilty—that is, without trial.

In the charter, what has been called a general jail delivery was required in each county once each year. The act of Parliament provided that a session of the court of oyer and terminer should be held twice a year in each county. The court was to inquire into the cause of the confinement of every person confined, and it was expected to try or discharge, at least on bail, all who had not been tried. The Habeas Corpus Act (31 Charles II) also contained provisions intended to insure speedy trials.

It seems that the means of enforcing this charter, or the rights there assured, was from the first enforced through the writ of habeas corpus, which has itself been called the safeguard and the palladium of our liberties. All agree that the use of this writ was frequent after the Great Charter, but it is not clear whether it was in existence before. It was the refusal of this writ, or delays in its use, which led to the Petition of Right and to the Habeas Corpus Act. It was soon found useful in many other respects, but it cannot be doubted that its most valued function was to enforce the rights secured by these memorable charters and laws, and, so far as I know, such use was never called in question in England.

In this country it has sometimes been denied that a defendant held to answer upon a valid indictment or information can be so discharged. It was so held in this state in *Ex parte Strong* (Cal. 1892), 31 Pac. 574. It was there said that the allegations of the petition, if true, showed that it was the duty of the su-

perior court to dismiss the prosecution, "but, until the information is dismissed, the imprisonment is lawful." In *Strong v. Grant*, 99 Cal. 100, 33 Pac. 733, it was said, in substance, that, in passing upon a motion for a dismissal, the court acted judicially, and could not be compelled by mandamus. In a concurring opinion, the chief justice said relief could be had in such a case through the writ of habeas corpus, and this was finally so held by the court in *Ex parte Vinton* (Cal. 1897), 47 Pac. 1019.

254 So far, I presume, all will agree, and I have alluded to the sources from which the idea of the constitutional and statutory provisions were derived for the sake of the remaining question, the entire difficulty in regard to which, in my view, comes from certain inconsistent decisions of this court. The constitution only guarantees a speedy public trial; the code, in effect, that an accused person must be tried within sixty days after filing the indictment or information. If tried within that period, and a new trial is granted by the superior court or obtained on appeal, it is contended the statute has no further application to the case. A trial has been had within the period prescribed, and the requirement of the statute has been fully satisfied. So far as the statute is concerned, he could be lawfully held for the balance of his life. And the same result could follow, although no trial was had within sixty days, if good cause were shown why it was not tried within that period, or a continuance was had beyond that time by consent of the defendant. If a material witness could not be procured within that time, or the defendant was too ill to be tried, he would thereby lose all possible benefit of the statute. For, if the letter of the statute is to control, it certainly does not require that the trial shall be had within sixty days, where good cause is shown, or the defendant consents to delay. And, if it has no force after sixty days have expired, it could not apply to the cases supposed at all. And the same contention might be indulged in regard to the constitutional guaranty of a speedy trial. If the accused has been tried, although the trial resulted in a mistrial, it might be said with equal plausibility that he has had a speedy trial, and the guaranty of the government for his benefit has been kept. And is this all that is left to us of these great achievements in the direction of securing individual liberty, as against the government?

It must be remembered that, in construing our Declaration of Rights, there is no presumption that the government or its

officers will act justly, but the contrary. These sections imply possible oppression, and are designed to enable the victim to assert his rights, even as against the government. The very first section in that chapter of our constitution asserts that the right of all men to enjoy and defend life and liberty is inalienable. Then follow twelve sections, all calculated to secure to individuals this right, as against the government. To the same end, section 13 declares the right to a speedy public trial. ³⁵⁵ This, certainly, has no other function than to protect those accused of crime against possible delay, caused either by willful oppression, or the neglect of the state or its officers. For, no doubt, as said by Blackstone (Blackstone's Commentaries, book 3, p. 138), "persons apprehended upon suspicion have suffered long imprisonment, merely because they were forgotten."

Our Declaration of Rights differs from the great English charters, in that it is not an assurance to the individual from a sovereign, but it is a command and a limitation of power upon state officials by the people, who created the formal government. Either is a recognition of the fact that the state cannot rightfully hold in prison even an accused person longer than is necessary that he may be tried, before trial had and judgment rendered.

The imprisonment, after the lapse of sixty days, is just as oppressive, and, if unnecessary, as much a violation of the rights of the accused person, as within the sixty days. There is no reason why the legislature should be desirous of protecting the rights of an accused person for sixty days, and be indifferent to his fate afterward. To attribute such ideas to the legislature is to charge it with folly. There is very little meaning or benefit in the statute, unless it is construed as it was in *People v. Morino*, 85 Cal. 515, 24 Pac. 892, and in *People v. Buckley*, 116 Cal. 146, 47 Pac. 1009. Regarded as a provision to enforce this constitutional guaranty, its effect must be held to be, that an unexcused delay of sixty days, at any time, to try a defendant will entitle him to have the prosecution dismissed. Without this statute, it may be doubted whether the prosecution could be dismissed as a penalty for delay. In some states I find a disposition to minimize the rights of an accused person, and it is sometimes provided, simply, that, unless tried, he may be discharged from custody.

The terms of the constitutional provisions on this subject vary in the different states. In two or three there is no constitutional declaration upon the subject, but all, I think, have stat-

utory provisions providing for the rights of accused persons in this regard. I cannot find that this precise question, under a statute like ours, has been decided. The view here taken was suggested in *In re Murphy*, 7 Wash. 257, 34 Pac. 834. See, also, *State v. Kuhn*, 154 Ind. 450, 57 N. E. 106, where *People v. Morino*, 85 Cal. 515, 24 Pac. 892, was approved; also, *In re McMichen*, 39 Kan. 406, 18 Pac. 473.

This construction was assumed by this court in *Ex parte Rosa*, 82 Cal. 109, 22 Pac. 1086. A mistrial within the period of sixty days was had in that case, and it was there assumed that another trial must be had within sixty days after the mistrial. That the defendant had been brought to trial, and a mistrial had, excused the delay until that time, and it was assumed that there must elapse sixty days during which there was no excuse for delay.

And, indeed, a mistrial is not a trial, within the meaning of the constitutional or statutory provision. The fact that there has been an attempted trial may constitute the good cause which the prosecution is required to show to excuse delay; but the speedy trial which is guaranteed is for the purpose of determining the guilt or innocence of the accused person, and the guaranty of the constitution, and of the Habeas Corpus Act of England, are of no substantial advantage if they mean less than this. On this subject it is said in *Church on Habeas Corpus*, section 254: "The fact that a former conviction on an indictment has been reversed and a new trial ordered leaves matters to stand as if there had never been any trial on the indictment. In the eye of the law, he has not been tried at all," etc. This is the reason why it is held that by a mistrial he has not been in jeopardy, and cannot avail himself of it as a defense. If he has been tried in the legal sense, he could do so.

It only remains to say that the statute does not authorize the state or its officers to hold an accused person in imprisonment unnecessarily, even for sixty days. As already stated, when the prosecution is begun, the state becomes a party litigant, and, as such, must diligently prosecute its case. No unnecessary delay against the will of the defendant is to be allowed to it.

The defendant is discharged from custody.

Van Dyke, J., Beatty, C. J., and Henshaw, J., concurred.

GAROUTTE, J., DISSENTED. He could not agree to the construction given the statute under consideration. "It is declared by the opinion," he said, "that when the statute says a defendant

'must be brought to trial within sixty days,' it means, in effect, that he must have a trial which results in a final judgment—that is, a trial which ends in a verdict of not guilty; or, if the result be a verdict of guilty, then the verdict must be one that stands the test of appeal, if an appeal be taken therefrom. In other words, it is declared that if the trial result in a disagreement of the jury, or in a verdict of guilty which is afterward set aside by the trial court, or by the appellate court upon appeal, then, in those cases, the defendant has had no trial, or, more incomprehensible still, it is said he has not been 'brought to trial.' He considered the requirement that a defendant must be "brought to trial" within sixty days to mean that he must be "put upon his trial" within that period of time. "Instances," he said, "may be found in the reports of this state where a defendant has been tried and convicted upon a single charge of crime three times, and, upon appeal, a new trial ordered upon such conviction. I cannot bring myself to believe that such defendant has not been 'brought to trial.'

"I also dissent," he said, "from the construction given the statute in another important particular. The statute says the defendant must be brought to trial within sixty days 'after the finding of the indictment or filing of the information.' The opinion declares the statute means, not what it says, but it means, in effect, that the defendant must be brought to trial, the first time within sixty days after the finding of the indictment or filing of the information, and thereafter within sixty days from the first trial, if that trial result in a disagreement of the jury, and if an appeal be taken to the appellate court, then within sixty days after the return of the remittitur. Now, this court is not authorized by judicial construction to so broaden the effect of this statute. The construction here given the statute blots out all meaning to the words 'indictment or information.' It seems to me the court has now made a statute by construction, which it feels the legislature ought to have made. Again, a contrary construction to the one here declared was given this statute eighteen years ago, in *People v. Glesea*, 63 Cal. 345—a construction which has been approved in the very late case of *People v. Lundin*, 120 Cal. 308, 52 Pac. 807, and probably in still later cases. It seems to me, under these circumstances, that if the law is not broad enough as judicially construed, it is for the legislative body to broaden it.

"Putting behind me all questions as to the construction of this statute, I am still satisfied, upon general principles of law, that the remedy by writ of habeas corpus cannot be invoked in this and similar cases. As before stated, the decision in this case, reduced and condensed, is, that this defendant should be discharged from custody upon a writ of habeas corpus because he has not been

brought to trial within sixty days from his last trial, no good cause for the delay appearing. In other words, by virtue of this statute it is declared that his imprisonment has become illegal, and he is entitled to be discharged in this proceeding. But how may this be done when the statute says the trial court must dismiss the prosecution upon motion when the sixty-day period has expired without a trial, and there is no good cause for the delay? That statute vests the trial court alone with power to discharge the prisoner for the reasons stated. It gives this court no added power or authority. Whatever power and authority this court has in the matter is above and beyond that statute. In the case of the petitioner, he asked the trial court, by motion, to dismiss the prosecution in his case, and invoked this statute to support the motion. The trial court denied the motion. It had jurisdiction to make that order, and it was specially enjoined upon it, by the statute itself, to exercise that jurisdiction. That order was a valid, binding order, as much so as any decree or judgment made within the jurisdiction of a court of record. It forever settled the question upon which it was made, unless it was successfully assailed by appeal or other direct attack. Indeed, it was not attempted in this proceeding to review the legal soundness of the order made by the trial court; but this court has proceeded upon habeas corpus as if no such order was ever made, and has tried for itself the very question of fact that it was the duty of the trial court to try, and which it tried, and, having full and complete jurisdiction thereof, decided directly to the contrary of that which this court has now decided. If the court can now do this, then any superior court in the state, having jurisdiction, can do the same thing, and thus a novel and interesting judicial spectacle is presented. Upon the hearing of the motion to dismiss the prosecution in the trial court, perchance the evidence was overwhelming, showing good cause for delay in bringing the defendant to trial, and upon the hearing in some other court, upon habeas corpus, the evidence may not be the same, for it is a wholly independent proceeding, and there the evidence may be strong to the effect that there is no good cause for delay, and the discharge of the defendant by that court follows. A case is then presented where a trial court, having perfect jurisdiction of the question at issue, makes an order or decree refusing to discharge the defendant, the order not even being erroneous to the weight of a hair, and then a second court, upon habeas corpus, hearing the identical issue and making a decree directly to the contrary. I am satisfied these results cannot be attained within sound legal principles." Mr. Justice McFarland also dissented, but without filing any separate opinion.

**OF THE RIGHT OF A PERSON ACCUSED OF CRIME TO A
SPEEDY TRIAL.***

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 - a. Of the Terms of Court.
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 - c. Time While Imprisoned Under Other Indictments for the Same Offense.
 - d. Time During Pendency of Appeals, Writs of Error, Motions for New Trials, etc.

*REFERENCES TO MONOGRAPHIC NOTES.

Public trial, right to, and what are infringements upon it: 28 Am. St. Rep. 308, 809.
Speedy trial, right to: 41 Am. Dec. 604-607.

IX. Effect of the Defendant's Discharge.**X. Remedies When Right to Speedy Trial has been Denied.**

- a. By Motion.
- b. By Appeal or Other Appellate Proceeding.
- c. By Habeas Corpus.

I. Constitutional Provisions.

The national constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been permitted": See U. S. Const., Amendt. 6. The constitutions of most, if not all, of the states of the Union, contain the same or similar provisions: See the monographic notes to *Nixon v. State*, 41 Am. Dec. 604-607, on the right to a speedy trial, and *People v. Murray*, 28 Am. St. Rep. 308, 309, on public trial, and what are infringements upon it.

The above provision of the federal constitution qualifies the judicial powers granted to the United States, and has no application to the powers exercised by the states: In re King, 51 Fed. 434, 438; note to *Nixon v. State*, 41 Am. Dec. 604.

The constitutional provision guaranteeing to every citizen a speedy and public trial in all criminal accusations is intended to prevent the government from oppressing its citizens, by holding criminal prosecutions suspended over them, and to prevent delay in the administration of justice by obliging the courts to proceed with dispatch in the trial of criminal charges: *Ex parte Turman*, 26 Tex. 708, 84 Am. Dec. 598. It extends to all grades of crime: *Ex parte Turman*, 26 Tex. 708, 84 Am. Dec. 598.

II. Definitions.

A speedy trial does not mean a trial immediately upon the presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation: *Ex parte Stanley*, 4 Nev. 113. It is "a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for a trial; and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial": *United States v. Fox*, 3 Mont. 512, 517, per Wade, C. J. A speedy trial is one conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays created by the ministers of justice: *Nixon v. State*, 2 Smedes & M. 497, 41 Am. Dec.

601; but the constitutional guaranty of a speedy and public trial of criminal charges does not mean that, in all the possible vicissitudes of human affairs, a person who is accused of a crime shall have a speedy and public trial in due form of law, because there may be times when the civil administration will be suspended by the force of uncontrollable circumstances, as in times of war: *Ex parte Turman*, 26 Tex. 708, 84 Am. Dec. 598.

The "speedy trial" guaranteed by the constitution does not operate to deprive the state of a reasonable opportunity of fairly prosecuting criminals: *Ex parte Jefferson*, 62 Miss. 223, 227; and, as such a trial means one regulated and conducted by fixed rules of law, any delay created by the operation of those rules does not work prejudice to any constitutional right of the defendant: *Nixon v. State*, 2 Smedes & M. 497, 41 Am. Dec. 601. "The constitutional provision," respecting a "speedy trial," says Clopton, J., in *Ex parte State*, 76 Ala. 482, "contemplates legislative enactments, and may be regarded as mandatory on the legislature—enjoining the duty to organize competent courts, to establish suitable modes of judicial proceedings, and provide adequate machinery for the administration of the criminal law; so that there shall be no unreasonable or unnecessary delay in bringing on a trial. Much must be left to the sound discretion and judgment of the law-maker, to make such provisions as will guard, on the one hand, against undue haste to the detriment of the public interests and safety, and on the other, against improper, unjust, and unwarranted procrastination, to the denial of the rights of the accused. Where there have been legislative enactments, reasonably adapted to secure a speedy trial, the constitutional guaranty cannot operate to discharge the accused, because of mistaken legislation, or because of a failure to foresee and provide for every contingency which may occasion delay. Continuances in the discretion of the presiding judge, or delay occasioned by want of time to try, or any like necessitating circumstances, do not contravene the right to a speedy trial. The accused is not entitled to a discharge by reason 'of any delay made necessary by the law itself': *Clark v. Commonwealth*, 29 Pa. St. 129." On the other hand, a person charged with the commission of a crime should be allowed a reasonable time in which to prepare his defense: *Lindville v. State*, 3 Ind. 580, 585; *Kennedy v. State*, 81 Ind. 379; *State v. Boyd*, 37 La. Ann. 781; *Commonwealth v. Winnemore*, 2 Brewst. 378; *State v. Lewis*, 1 Bay, 1; *Dunn v. People*, 109 Ill. 635; *Charlon v. State*, 106 Ga. 400, 32 S. E. 347; *State v. Pool*, 50 La. Ann. 449, 23 South. 503.

III. Statutory Provisions.

a. **Purpose and Scope of Statutes.**—In most, if not all, of the states, are statutes which provide that one accused of crime shall be discharged from custody if not brought to trial within a speci-

fied time. In some, this time is designated by a given number of days, and in others by a number of terms of court. Thus, in California, the prosecution must, unless good cause is shown to the contrary, be dismissed if the defendant is not brought to trial within sixty days after the filing of the indictment or information, when the trial is not postponed by him: See the principal case. In Indiana, he cannot, except as prescribed by the statute, be held without trial for more than two consecutive terms; or, if he is under recognizance, for more than three terms: *State v. Kuhn*, 154 Ind. 450, 57 N. E. 106. In Missouri, he must be brought to trial before the end of the second term, unless for good cause shown why it is not done: *State v. Billings*, 140 Mo. 193, 41 S. W. 778; or, if he is out on bail, before the end of the third term: *State v. Wear*, 145 Mo. 162, 46 S. W. 1099. In Nebraska, a bailed prisoner must be tried before the end of the third term: *Whitner v. State*, 46 Neb. 144, 64 N. W. 174; and in Virginia, one charged with a felony "shall be forever discharged from prosecution for the offense if there be three regular terms of the circuit, or four of the county, corporation, or hustings court, in which the case is pending, after he is so held without a trial, unless" for good cause shown why it should not be done: *Kibler v. Commonwealth*, 94 Va. 804, 26 S. E. 858.

The practical intention of statutes authorizing the discharge of a prisoner, if not brought to trial within the time limited by statute, without any fault or hindrance on his part, and without any reasonable or legal excuse therefor, is to carry out the constitutional right of the accused to a "speedy trial," and this is done by prescribing a definite and uniform rule for the government of courts in their practice: *In re McMicken*, 39 Kan. 406, 18 Pac. 473. The object of a statute requiring an accused person to be tried at the next term of court after he is imprisoned is to secure a "speedy trial": *Thompson v. Washington Territory*, 1 Wash. Ter. 547.

A statute authorizing an accused person to be discharged, if not brought to trial within a specified time, does not invalidate a sentence pronounced after such time on a verdict rendered in due time: *State v. Watson*, 95 Mo. 411, 8 S. W. 383.

A defendant in a criminal prosecution, who has never been committed to jail or otherwise detained in custody, is not entitled to be discharged on the ground that he has not been brought to trial within the time provided by law: *Hammond v. State*, 39 Neb. 252, 58 N. W. 92. He must first show that he is actually or constructively imprisoned, thus putting himself in the situation of persons for whose benefit such a provision was intended: *State v. Williams*, 35 S. C. 160, 14 S. E. 309.

b. **Statutory Grounds for Delay.**—The statutes which authorize a person accused of crime to be discharged, if not tried within the

time limited therein, contain exceptions or savings which will excuse delay on the part of the state in bringing the case to trial. Some of these are very brief, but the statute of Virginia excuses delay on the part of the state, where the failure to try the defendant within the time prescribed "was caused by his insanity, or by the witnesses for the commonwealth being enticed or kept away, or prevented from attending by sickness or inevitable accident, or by continuance granted on the motion of the accused, or by reason of his escaping from jail or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict, or where there be no court held at the regular term, or where there is court held, and for any reason it would be injudicious, in the opinion of the court, to have jurors and witnesses summoned to that term, which reason shall be especially spread upon the records of the court; but the time during the pendency of any appeal in any appellate court shall not be included as applying to the provisions of this act": *Kibler v. Commonwealth*, 94 Va. 804, 26 S. E. 858. This is a very comprehensive statute in detailing what will excuse delay on the part of the state in trying an accused person for crime, but it is conceived that the law would be substantially the same without all the particulars therein enumerated.

c. **Enumeration of Some Grounds for Delay Does Not Exclude All Others.**—Statutes, by an enumeration of exceptions, or excuses for failure to try, do not exclude others of a similar nature or in pari ratione; they simply enact that, if the commonwealth is in default for the time prescribed, without any of the excuses for the failure enumerated in the statute, or such like excuses, fairly implied by the courts from the reason and spirit of the law, the prisoner should be entitled to his discharge: *Commonwealth v. Adcock*, 8 Gratt. 661, 681; *Wadley v. Commonwealth*, 98 Va. 803, 35 S. E. 452. Thus, under a statute in which an injunction is not among the exceptions enumerated in providing for the discharge of a prisoner who has not been brought to trial within the time provided by law, the accused is not entitled to be discharged from prosecution on the ground that four regular terms of court elapsed after the indictment was found without a trial, where he prevented the trial by obtaining an injunction from a federal court: *Wadley v. Commonwealth*, 98 Va. 803, 35 S. E. 452. As to what constitutes "good cause" for delay in the trial of a defendant accused of crime beyond the time prescribed by the statute, see the discussion in *People v. Buckley*, 116 Cal. 146, 47 Pac. 1009.

d. **Persons Imprisoned for Other Crimes.**—A statute concerning the right of a person committed for a supposed criminal offense to apply for a discharge for want of prosecution if not tried within a time stated, does not apply where the party charged is

imprisoned in the penitentiary for another crime: *Gillespie v. People*, 173 Ill. 233, 32 N. E. 230.

IV. Delays Which are Excusable.

a. **Delays Due to the Illness of the Trial Judge or of the Prosecuting Attorney.**—A failure to bring a person charged with crime to trial within the time prescribed by statute does not justify a dismissal of the prosecution, if the delay was caused by the illness of the trial judge: *People v. Camillo*, 69 Cal. 540, 11 Pac. 128; or by the sickness of the prosecuting attorney: *People v. Shufelt*, 61 Mich. 237, 28 N. W. 72.

b. **Delay Due to Quashing One Indictment and the Finding of Another.**—In Nebraska, where an accused person is held in jail, an information must be filed by the prosecutor during the term of court at which the prisoner is required to appear: *State v. Miller*, 43 Neb. 860, 62 N. W. 238. If an information is quashed and a new one filed, a failure to try the accused within the statutory time, after the filing of the first information, is not a valid objection to his being tried upon the second one: *State v. Hansen*, Wash. 235, 38 Pac. 1023. So, after a change of venue to another county, in which a new indictment is filed, and disagreement of the jury, if a new indictment is found in the original county, the first one having been quashed, and the defendant is tried at the second term after the term at which the indictment was found and the defendant was apprehended, he is not entitled to a discharge on account of a speedy trial, where the statute does not require him to be tried before the end of the second term after such indictment was found: *State v. Billings*, 140 Mo. 193, 41 S. W. 778.

c. Delays Due to Continuances Granted.

Continuances Properly and Necessarily Ordered.—"It is a settled legal principle," said Hawley, C. J., in *Ex parte Larimer*, 11 Nev. 90, 95, "that every defendant held on a criminal charge by indictment is entitled to a speedy trial, and this right should never be denied; but it does not necessarily follow that trials are to be held regardless of the public condition of the country that exists where the court is held. Ordinarily, the defendant is entitled to his trial as soon as it can properly be reached in regular order upon the calendar, and the prosecution has a reasonable time to prepare for the trial; but unforeseen events are liable to occur, making it absolutely necessary for a court to continue cases, even on its own motion; and whenever such events do occur, and the necessity for such order is clearly shown, its power to so continue the case is undoubted."

Continuances not Objected to.—A defendant cannot complain of an order continuing a case, where he, being present, makes no objection: *Maxwell v. State*, 89 Ala. 150, 7 South. 824. A judgment of conviction will not be reversed on appeal because of a

failure to bring the accused to trial within the time limited by law, where there were orders postponing the trial and refusing to dismiss the prosecution, if there is nothing to show that the defendant made any objection to the continuance, or that good cause for denying the motion to dismiss was not shown by the prosecution: *People v. Douglass*, 100 Cal. 1, 84 Pac. 490.

3. **Presumption that Continuances were Properly Ordered.**—Notwithstanding a statute declaring that the accused shall be discharged if not brought to trial within a specified time, it will be presumed on appeal that a continuance of the case was upon sufficient ground, although on motion of the state the cause had been continued three times: *Johnson v. State*, 42 Ohio St. 207. It is only when the state is in fault that the defendant can claim his discharge on the ground that, by reason of continuances, he has not been brought to trial: *State v. Mollineaux*, 149 Mo. 646, 51 S. W. 462. Under a statute providing for the discharge of a prisoner if four terms of court elapse without a trial, the fact that one term has passed without an order in the case is not a denial of a speedy trial: *Nicholas v. Commonwealth*, 91 Va. 741, 21 S. E. 364; and continuance, without objection, after a disagreement of the jury, to the next term of court, is not a denial of the prisoner's right to a speedy trial: *State v. Enke*, 85 Iowa, 35, 51 N. W. 1146.

4. **Arbitrary and Other Improper Grants of Continuances.**—But the policy of the law and the right to a speedy trial forbid that a person accused of crime shall be detained beyond any term of court at which he may be lawfully tried, unless good cause is shown for a continuance. Hence, an arbitrary continuance, where the accused is ready for and demands trial, and may be lawfully tried, to await the expiration of the term of imprisonment of a convicted felon, so that he may be a competent witness, is reversible error, where the prosecution is not prepared for trial, and relies upon the evidence of such convict after his discharge: *Benton v. Commonwealth*, 90 Va. 328, 18 S. E. 282.

5. **Improper Action or Inaction of the Prosecuting Attorney.**—It is not allowable, and is a denial of a speedy trial, for a public prosecutor to arrest the trial of a prisoner, by withdrawing a juror, so as to enable him to try the accused at a subsequent term, solely because he finds himself unprepared with the evidence to convict, when his condition is not the result of improper practice on the part of the prisoner, or some one acting with or for him. It is a denial of a speedy trial if the prosecution neglects or fails to procure the attendance of witnesses, who have not been summoned, and it is not material to inquire for what reason the prosecution has so failed or neglected to prepare for trial, the fact of such failure or neglect being sufficient: *Benton v. Commonwealth*, 90 Va. 328, 334, 18 S. E. 282; *Klock v. People*, 2 Park. C. C. 676.

The object of the Illinois statute, limiting the time for bringing an accused person to trial, "appears to be to fix an absolute limit of time within which the prosecution must bring the prisoner to trial, and beyond which there shall be no continuance on account of the absence of evidence for the people, and to fix, as this limit, three terms of the court": *Ochs v. People*, 124 Ill. 399, 16 N. E. 662. But in Kansas a discharge may be refused to enable the state to obtain material evidence for a trial at the succeeding term: *In re McMicken*, 39 Kan. 406, 18 Pac. 473.

6. Continuances Because of the Judge or Court.—If the state announced itself ready to proceed at once with the trial of a defendant, but there was a want of time, during the remainder of the term, to try the case upon its merits, the accused is not entitled to a discharge on the ground that he was not brought to trial within the time limited by law: *In re Edwards*, 35 Kan. 99, 10 Pac. 539; *State v. Huting*, 21 Mo. 464, 474; *Erwin v. State*, 29 Ohio St. 186, 23 Am. Rep. 733; *Johnson v. State*, 42 Ohio St. 207; and see *Ex parte Lowrie*, 4 Utah, 177, 7 Pac. 493. A failure to bring a person charged with crime to trial within the time limited by law does not justify a dismissal of the prosecution, where the delay was caused by the engagements of the trial judge in the trial of other causes, which extended beyond the time limited by law: *People v. Camilo*, 69 Cal. 540, 11 Pac. 128; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; especially so where he was engaged in the trial of other criminal cases which had precedence over the defendant's case: *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305; and see *People v. Matson*, 129 Ill. 591, 22 N. E. 456; and it seems that a judge's failure to hear criminal cases before civil cases cannot be allowed to work prejudice to a defendant's right to a speedy trial: *State v. Kuhn*, 154 Ind. 450, 57 N. E. 106.

d. Delay Due to the Disagreement or to the Excusable Discharge of Jury.—The intent of a statute providing that a person accused of crime shall be discharged if not brought to trial within a certain time is, that the right to discharge shall result from a want of prosecution. A defendant admitted to trial within the time limited is prosecuted, although a verdict may not be reached by reason of the jury's failure to agree; and such a construction of the statute as would lead to the absurd result that, if a trial results in a disagreement, it should not be regarded as a trial, and the defendant should be discharged thereunder, cannot be adopted: *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250; *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *Glover's Case*, 109 Mass. 340; where the defendant has a statutory right to a trial, the court cannot order a mistrial without the defendant's consent, except for inevitable accident: *Geiger v. State*, 25 Ga. 667; but the fact that a mistrial is declared without the consent of the defendant does not entitle him

to a discharge for want of prosecution, where the court is ready to again place him upon trial at the same term, but the case is continued on the defendant's own motion: *Little v. State*, 54 Ga. 24. If a juror becomes accidentally disabled from attending court, and the jury is necessarily discharged and the case continued, such mistrial and continuance constitute a sufficient reason for denying the defendant's motion for a discharge on the ground that he was not tried within the time limited by law, at least where such motion was made before that time had expired: *Ex parte Ross*, 82 Cal. 109, 22 Pac. 1086.

e. **Delay Caused or Assented to by the Defendant.**—A failure to bring to trial a defendant charged with crime within the time allowed by law does not entitle him to be discharged, if caused by the defendant himself, or through his fault. In such a case he cannot maintain that he has been denied a speedy trial: *Ex parte Cox*, 12 Tex. App. 665; *McGuire v. Wallace*, 109 Ind. 284, 10 N. E. 111; *People v. Matson*, 129 Ill. 591, 22 N. E. 456; *State v. Billings*, 140 Mo. 193, 202, 41 S. W. 778. He cannot complain when the delay of the trial was granted at his own request: *People v. Cline*, 74 Cal. 575, 16 Pac. 391; or where the case was improperly dismissed by the proper tribunal upon his own motion: *Ex parte Cox*, 12 Tex. App. 665. That there have been four continuances at the instance of the defendant, six for the state, and one by consent, where the ground of the action of the trial court does not appear, does not show that the defendant is entitled to his discharge as having been improperly deprived of a speedy trial: *State v. Nugent*, 8 Mo. App. 563. A defendant's consent to postponements of his trial, made from time to time, if not equivalent to a delay granted at his request, makes a showing of "good cause" in not trying him within the time prescribed by the statute: *People v. Benc*, 130 Cal. 159, 62 Pac. 404. A delay of the trial, occasioned by a continuance with the consent of all parties, must be considered as happening "on the application of the prisoner," within the meaning of statutes which provide that unless a defendant is brought to trial within the time stated therein, he shall be discharged: *Healy v. People*, 177 Ill. 306, 52 N. E. 426. These statutes are intended to operate only when there is some delay on the part of the state: *State v. Marshall*, 115 Mo. 383, 22 S. W. 452; *State v. Steen*, 115 Mo. 474, 22 S. W. 461; and cannot be invoked where continuances are made by the court of its own motion: *State v. Marshall*, 115 Mo. 383, 22 S. W. 452.

Nor can the defendant be discharged under such statutes where he kept the state's witnesses out of the way: *Commonwealth v. Haggerty*, 4 Brewst. 320; *Republica v. Arnold*, 8 Yeates, 263; or where the delay was caused by the defendant's appeal from a judgment of conviction and the case was remanded for a second

trial: *People v. Lundin*, 120 Cal. 308, 52 Pac. 807; or by his writ of error to reverse a conviction: *Patterson v. State*, 50 N. J. L. 421, 14 Atl. 125; *Smith v. Commonwealth*, 85 Va. 924, 9 S. E. 146; or by his obtaining from a federal court an injunction against the prosecution: *Wadley v. Commonwealth*, 98 Va. 803, 35 S. E. 452. Neither can a defendant be discharged on the ground that he has not been tried within the time prescribed by law, where he has moved to quash the indictment and the court holds the question under advisement for the remainder of the term, as the delay is equivalent to a postponement with his consent: *Ex parte Walton*, 2 Whart. 501; or where he, being jointly indicted with others, makes a request, at a term at which he might be tried, for a severance, and the trial of the others, which is at once begun, is not finished at the end of the term, when the trial of the other defendant is continued: *People v. Matson*, 129 Ill. 591, 22 N. E. 456; or where an accessory has refused to be tried without his principal, and, the latter having absconded, there is not time during the term to finish proceedings of outlawry commenced against the principal: *Commonwealth v. Sheriff*, 16 Serg. & R. 304; or where the prisoner, being out on bail, causes delay by failing to appear: *Moreland v. State*, 51 Ga. 192; *State v. Arthur*, 21 Iowa, 322.

f. **Delay Due to Granting a Change of Venue.**—If a defendant solicits a change of venue to another county, and he is brought to trial there within the statutory time, he is not entitled to a discharge as for want of prosecution, though there was neglect on the part of a clerk in transmitting the papers and records to such other county, as this, if available, could hardly be attributed to any want of diligence on the part of the prosecution: *State v. Cox*, 65 Mo. 29.

V. Inexcusable Delays Entitling the Accused to be Discharged.

A statute providing that one accused of crime shall be brought to trial within a specified time, where delay is not attributable to the prisoner's act, is intended to give effect to the clear, constitutional right to a speedy trial: *People v. Matson*, 129 Ill. 591, 22 N. E. 456. It is mandatory and imperative in its provisions, and confers no discretion upon the court: *People v. Morino*, 85 Cal. 515, 24 Pac. 892. It should also be liberally construed in favor of liberty: *People v. Matson*, 129 Ill. 591, 22 N. E. 456. Hence, the accused is entitled to his discharge, after the lapse of time prescribed by law, where he was not tried, if he brings himself within the statute, by showing that he was not in fault, and that he did not apply for a continuance, and where the prosecution shows no valid cause for the delay: *In re McMicken*, 39 Kan. 406, 18 Pac. 473; *Robinson v. State*, 12 Mo. 592; *Cummins v. People*, 4 Colo. App. 71, 34 Pac. 734; *People v. Morino*, 85 Cal. 515, 24 Pac. 892; *Brady v. People*, 51 Ill. App. 112; *Walker v. State*, 89 Ga. 482, 15 S. E. 553;

In re Garvey, 7 Colo. 502, 4 Pac. 758. This principle applies to prisoners out on bail, though in such cases there is generally a longer time prescribed by the statute in which they shall be brought to trial: State v. Wear, 145 Mo. 162, 46 S. W. 1099; Van Buren v. People, 7 Colo. App. 136, 42 Pac. 599; State v. Kuhn, 154 Ind. 450, 57 N. E. 106.

In Kansas, where the defendant is in custody at the term at which the information is filed, such information must be tried at that term, unless continued for cause: In re Vance, 54 Kan. 495, 88 Pac. 557; In re Jourdan, 54 Kan. 496, 88 Pac. 556; State v. Miller, 48 Neb. 860, 62 N. W. 288. A defendant not tried within the time limited by law is entitled to a discharge, where the state's only excuse for its failure to try him was that no term of court for which a jury had been called was in session after the filing of the information: State v. Brodie, 7 Wash. 442, 85 Pac. 187; or where the reason given is that the court was occupied in the trial of other causes, when it appears that they were civil causes, and that at least eight days of the time limited by statute were consumed in such trial: State v. Kuhn, 154 Ind. 450, 57 N. E. 106; or where the state has omitted to provide a public prosecutor: State v. Sims, 1 Over. 258. The fact that the prosecuting officer and sheriff have heard and believe that the defendant, who is out on bail, has left the state is no excuse for not calling for his appearance and forfeiting his bail. Hence, if the accused has not been brought to trial within the time prescribed by law, and the indictment has been dismissed for the neglect of the prosecution, it is error to set aside such dismissal: State v. Radoicich, 66 Minn. 294, 69 N. W. 25. A defendant has been brought to trial, where, after being put upon trial, a juror is accidentally disabled from attending court and the jury is necessarily discharged and the case continued: Ex parte Ross, 82 Cal. 109, 22 Pac. 1066. In fact, a trial is begun when the court enters upon the impaneling of the jury: Lipscomb v. State, 76 Miss. 223, 25 South. 158; People v. Hawkins, 127 Cal. 372, 59 Pac. 697.

VI. Waiver by the Accused of His Right to be Discharged.

There is no duty imposed upon a court to order the dismissal of a criminal charge against one who has not been tried within the time prescribed by law, unless the defendant demands such dismissal. He may waive the right to make such demand, and does waive it by going to trial, without objecting that the time limit has passed: People v. Hawkins, 127 Cal. 372, 59 Pac. 697. A defendant, to obtain a dismissal, where he has not been tried within the statutory time, should bring himself within the statute: State v. Endsley, 19 Utah, 478, 57 Pac. 430; In re Edwards, 35 Kan. 99, 10 Pac. 539; State v. Wear, 145 Mo. 162, 195, 46 S. W. 1099.

VII. Proceedings for Securing or Opposing a Discharge.

a. **Evidence.**—It is probably enough for the accused to show that the time fixed by statute has expired, and that the case had not been postponed on his application: *People v. Morino*, 85 Cal. 515, 24 Pac. 892; *In re Garvey*, 7 Colo. 502, 4 Pac. 758. It may be shown that there was a want of time to try the case within the period limited by the statute: *In re McMicken*, 39 Kan. 406, 18 Pac. 473; and, on appeal, there must be an affirmative showing by the record, or otherwise, of the fact that the delay did not happen on the prisoner's application, and was not occasioned by want of time to try the case. If the record fails to disclose these facts, the burden seems to be upon the accused to show them. It is, at least, the safer plan for him to do so, because, if his application for a dismissal is refused, it will be presumed on appeal that the court proceeded regularly and without error: *Korth v. State*, 46 Neb. 631, 65 N. W. 792. But, as a judgment of dismissal, on the ground that the accused was not tried within the time prescribed by law, cannot be collaterally attacked, it is not incumbent on a defendant at a trial under a subsequent indictment to show affirmatively that the case had been unduly continued after the first indictment was found, without his fault, or for want of time to try the case, or that the judgment was otherwise regular: *State v. Wear*, 145 Mo. 162, 46 S. W. 1099.

b. **The Demand for Trial.**—Under the statute of Georgia, a person accused of crime and held in jail may demand a trial; but such demand must be made at the first term after the indictment is found, or at the second term, and not afterward: *Price v. State*, 25 Ga. 133; *Watts v. State*, 26 Ga. 231; unless by special permission of the court: *Silvey v. State*, 84 Ga. 44, 10 S. E. 591. But to entitle him to an order of discharge and acquittal he must show that he made such demand according to the statute: *Couch v. State*, 28 Ga. 64; and it is necessary that there should have been juries impaneled and qualified to try the prisoner, when the demand was made and at the next succeeding term: *Roebuck v. State*, 57 Ga. 154; *Jordan v. State*, 18 Ga. 532; *Durham v. State*, 9 Ga. 306; *Adams v. State*, 65 Ga. 516.

When a jury is impaneled and qualified to try the prisoner, both at the term when the demand is made, and at the term when his discharge is moved, and he is not tried, he is then entitled to a discharge: *Kerese v. State*, 10 Ga. 95; *Durham v. State*, 9 Ga. 306; *Silvey v. State*, 84 Ga. 44, 10 S. E. 591; *Walker v. State*, 89 Ga. 482, 15 S. E. 553; but he is not entitled to be discharged and acquitted of any other offense charged in an indictment found after the demand was made and entered: *Brown v. State*, 85 Ga. 713, 11 S. E. 831.

The demand for bail must be made in the court in which the case is pending: *Hunley v. State*, 105 Ga. 636, 31 S. E. 543.

A prisoner out on bail is entitled to make a demand for trial, notwithstanding the forfeiture of his bond for nonappearance, if there is a jury in the box qualified to try the cause when the demand is made: *Hall v. State*, 21 Ga. 148.

Even where the statute does not require a demand to be made for trial, it has been held that a person charged with crime is not entitled to be discharged on the ground that he was not tried within the time limited by law, where he made no demand for trial, or failed to resist postponement: *Dillard v. State*, 65 Ark. 404, 46 S. W. 533; *Stewart v. State*, 13 Ark. 720; *Gallagher v. People*, 88 Ill. 335; but it would seem that a demand is not necessary where the statute does not require it: *State v. Wear*, 145 Mo. 162, 198, 46 S. W. 1099; that it is enough for the defendant to show that the time fixed by statute has expired without a trial, and that the case was not postponed on his application: *People v. Morino*, 85 Cal. 515, 24 Pac. 892; *In re McMicken*, 39 Kan. 406, 18 Pac. 473. If the record, however, fails to show that various continuances were had on the application of the state, or that the defendant was present and ready for trial, an appellate court cannot say whether a defendant is entitled to be discharged on the ground that he was not tried within the time prescribed by law: *Gallagher v. People*, 88 Ill. 35.

VIII. Computation of Time.

a. *Of the Terms of Court.*—In computing terms of court under statutes which provide, in substance, that a defendant accused of crime shall be discharged if more than a certain number of terms elapse after the filing of the indictment or information before he is brought to trial, the term of court at which the indictment or information was found is to be excluded: *Davis v. State*, 51 Neb. 301, 314, 70 N. W. 984; *Whitner v. State*, 46 Neb. 144, 64 N. W. 704; *Hammond v. State*, 39 Neb. 252, 58 N. W. 92; *Kibler v. Commonwealth*, 94 Va. 804, 26 S. E. 858; *Dulin v. Lillard*, 91 Va. 718, 20 S. E. 821; *Ochs v. People*, 124 Ill. 399, 16 N. E. 662; *Grady v. People*, 125 Ill. 122, 16 N. E. 654; *Watson v. People*, 27 Ill. App. 493; *Stewart v. State*, 13 Ark. 720; *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250. Thus a statute providing that the accused shall be tried within four terms of the county court after indictment is satisfied by a trial at the fourth term afterward held: *Davis v. Commonwealth*, 89 Va. 132, 15 S. E. 388. So, if he must be brought to trial before the end of the second term, he may lawfully be put upon trial at the end of the second term held after the finding of the indictment: *Stewart v. State*, 13 Ark. 720. The terms to be counted are those after the prisoner has been indicted and held for

trial: *Kibler v. Commonwealth*, 94 Va. 804, 28 S. E. 858; *Sands v. Commonwealth*, 20 Gratt. 800.

If an accused person is bound over by an examining magistrate during a session of the court to which he is sent for further trial, that term of court is not one of the two at which the statute directs that he shall be indicted, or be discharged from imprisonment: *Bell's Case*, 7 Gratt. 646; *Bell v. Commonwealth*, 8 Gratt. 600.

b. **Terms of Court Which Must be Excluded from the Computation.**—In considering whether a prisoner is entitled to a discharge when he has not been brought to trial within the number of terms designated by the statute, a term which lapses or which is adjourned in the midst of trial, by reason of the illness of the judge is not to be counted in the prisoner's favor: *State v. Huting*, 21 Mo. 464, 473; nor is a term at which there was a trial and a failure of the jury to agree to be counted: *State v. Huting*, 21 Mo. 464, 473; *Davis v. State*, 51 Neb. 301, 313, 70 N. W. 984; *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250; nor is a term, which is by law limited to six days, to be counted, where, on the fourth day, the case was continued, because up to that time only five jurors had been impaneled: *State v. Huting*, 21 Mo. 464, 474; nor is a term which has elapsed by the prisoner's fault, as where the trial was prevented by an injunction obtained by the prisoner from a federal court: *Wadley v. Commonwealth*, 98 Va. 808, 35 S. E. 452; or where defendants out on bail did not appear until the term at which they were tried: *Meadowcraft v. People*, 163 Ill. 56, 76, 54 Am. St. Rep. 447, 459, 45 N. E. 303, 308; nor are special terms to be counted: *State v. Huting*, 21 Mo. 464, 475.

c. **Time While Imprisoned Under Other Indictments for the Same Offense.**—Periods of confinement under previous indictments for the same offense which were dismissed by *nolle prosequi*, or suspended by the finding of a subsequent indictment, are to be counted: *Fanning v. State*, 14 Mo. 386. The statute, in such cases, operates only when there is some laches on the part of the state: *State v. Huting*, 21 Mo. 464. But if the prescribed number of terms elapse after a second indictment is found for the same offense after the first indictment is quashed, without a trial, or postponement on the defendant's part, he is entitled to his absolute discharge at the next term, and it is error to put him upon trial: *Brooks v. People*, 88 Ill. 327.

A defendant who has been indicted and committed, and obtained a change of venue to each of two other counties in succession, in each of which a *nolle* was entered, cannot plead such continuances in bar to a third indictment in the county where the crime was committed, on the statutory ground that two terms of court were held after the first indictment before he was brought to trial on

the last indictment: *State v. Burlingame*, 146 Mo. 207, 48 S. W. 72; and see *State v. Cox*, 65 Mo. 29.

d. **Time During Pendency of Appeals, Writs of Error, Motions for New Trials, etc.**—A lapse of time, whether of days or terms of court, beyond that limited by law, is not to be counted in considering whether a prisoner has been brought to trial within the time prescribed by the statute, where such time escaped on the defendant's appeal or writ of error. Otherwise expressed, the time occurring during the pendency of an appeal or writ of error cannot be considered: *People v. Lundin*, 120 Cal. 808, 52 Pac. 807; *State v. Bulling*, 105 Mo. 204, 15 S. W. 867; *Patterson v. State*, 50 N. J. L. 421, 14 Atl. 125; even where the trial resulting in the judgment from which the appeal was taken was *coram non judice* and void: *State v. Bulling*, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830. So, where a conviction has been set aside on the defendant's motion, and a new trial granted, a failure to retry the case within the time limited by the statute after the information was filed is no ground for dismissal: *In re Murphy*, 7 Wash. 257, 34 Pac. 834. If a conviction is reversed on error, the accused is not entitled to discharge before the trial court has had an opportunity of trying him again: *Patterson v. State*, 50 N. J. L. 421, 14 Atl. 125. In fact, it has been held that the time prescribed by statute in which a defendant must be tried was intended to apply only to the period of time intervening between the commitment and the first trial, and that though he is kept in custody, after a new trial is awarded, longer than such prescribed time, he cannot invoke such statute to secure a discharge from imprisonment: *Commonwealth v. Superintendent*, 97 Pa. St. 211. Delay caused by the state's appeal from an order granting a new trial to the defendant, though such appeal was unauthorized and more than the prescribed number of terms of court elapse without another trial, is not a denial to the accused of the speedy trial guaranteed to him by the constitution: *State v. Conrow*, 13 Mont. 552, 35 Pac. 240.

IX. Effect of the Defendant's Discharge.

In some of the states, it seems that statutes concerning the right of a person accused of crime to be tried within a time limited by law do not provide for any discharge of the offense, but operate merely to set the prisoner at liberty. In other states, however, the statute provides for the absolute discharge of the prisoner from the offense, where he has not been brought to trial within the time therein prescribed; and this virtually amounts to an acquittal: *In re Edwards*, 35 Kan. 99, 10 Pac. 539; *Keresse v. State*, 10 Ga. 95; *Ex parte McGehan*, 22 Ohio St. 442; and no case appears to exist where a person discharged because of the failure of the state to bring him to trial within a given time has ever been put on his

trial for the offense from which he was discharged: *State v. Wear*, 145 Mo. 162, 200, 46 S. W. 1099.

X. Remedies Where Right to Speedy Trial has been Denied.

a. By Motion.—A defendant accused of crime, and who has not been brought to trial within the time prescribed by law, or who has, in other words, been denied a speedy trial, may move the dismissal of the prosecution on that ground: *People v. Camilo*, 69 Cal. 540, 11 Pac. 128; *State v. Hansen*, 10 Wash. 235, 38 Pac. 1023; *People v. Morino*, 85 Cal. 515, 24 Pac. 892; and if his motion for dismissal is refused, he may prosecute an appeal: *People v. Morino*, 85 Cal. 515, 24 Pac. 892; *Brady v. People*, 51 Ill. App. 112; *State v. Brodie*, 7 Wash. 442, 35 Pac. 187; or writ of error: *Klock v. People*, 2 Park. C. C. 676; *Cummins v. People*, 4 Colo. App. 71, 34 Pac. 734; *Benton v. Commonwealth*, 90 Va. 328, 18 S. E. 282; but he cannot have the denial of such a motion corrected on mandamus: *Strong v. Grant*, 99 Cal. 100, 33 Pac. 733.

b. By Appeal or Other Appellate Proceeding.—A supreme court will not reverse a judgment of conviction on the ground that the prisoner was not tried within the period fixed by the statute, unless it appears by the record that he applied to the lower court for a discharge on that ground: *State v. Cox*, 65 Mo. 29; but where the record does show such an application and its improper refusal, a judgment of conviction may be reversed on appeal or writ of error and the prosecution ordered to be dismissed on the ground that a speedy trial was not had, unless the prosecution shows a valid reason for the delay: *People v. Morino*, 85 Cal. 515, 24 Pac. 892; *Cummins v. People*, 4 Colo. App. 71, 34 Pac. 734.

c. By Habeas Corpus.—The remedy of a defendant accused of crime, and who has been denied a speedy trial, or not been brought to trial within the time prescribed by law, is not confined to an appeal or writ of error. There is a remedy by habeas corpus. If his discharge is improperly denied in the trial court, he ought to be released on habeas corpus because that proceeding is the only one which affords him a speedy remedy. If his only remedy is by appeal, he must continue wrongfully restrained of his liberty until the case is finally determined by the trial court, as an appeal can be taken by a defendant only after judgment. "It would be a palpable violation of the bill of rights, and also of the statute, to require an accused who is entitled to his discharge, so far as relates to the offense for which he was committed, to be restrained of his liberty indefinitely at the instance of the state, or upon the order of the court, to await a final trial, or determination of the case against him": *In re McMicken*, 39 Kan. 406, 18 Pac. 473.

It is true that a writ of habeas corpus is not available to a defendant who has not been tried within the time prescribed by the statute, where he is not entitled to a discharge whether the pro-

ceeding by habeas corpus is proper or not: In re McMicken, 39 Kan. 406, 18 Pac. 473; In re Murphy, 7 Wash. 257, 34 Pac. 834; State v. Miller, 43 Neb. 860, 62 N. W. 238. He should not be discharged on habeas corpus unless he has first applied to the trial court for a discharge, and his application has been refused: Patterson v. State, 49 N. J. L. 326, 8 Atl. 305; or where he has not demanded, or been refused, a trial: Hernandez v. State, 4 Tex. App. 425; or where he makes application for the writ within the time prescribed by statute for his trial, though there was an order of continuance for a longer period: Ex parte Ross, 82 Cal. 109, 22 Pac. 1086; or where there was a mistrial: State v. Spergen, 1 McCord, 563; or where the delay in trial was caused by the defendant himself: Ex parte Walton, 2 Whart. 501; McGuire v. Wallace, 109 Ind. 284, 10 N. E. 111; People v. Matson, 129 Ill. 591, 22 N. E. 456; as where there was a postponement with his consent: Ex parte Walton, 2 Whart. 501; or where the case has been improperly dismissed by the proper tribunal upon motion of the defendant: Ex parte Cox, 12 Tex. App. 665; or where he has kept the state's witnesses out of the way: Respublica v. Arnold, 3 Yeates, 263; or where the defendant, an accessory, does not waive the conviction of his principal who has absconded: Commonwealth v. Sheriff, 16 Serg. & R. 304; or where the delay in the trial was made necessary by the law itself, as in the case of proper continuances for want of time to try the case, or other good cause: Nixon v. State, 2 Smedes & M. 497, 41 Am. Dec. 601; Ex parte Lowrie, 4 Utah, 177, 7 Pac. 493; Ex parte Larkin, 11 Nev. 90; Ex parte Warris, 28 Fla. 371, 9 South. 718; In re Edwards, 35 Kan. 99, 10 Pac. 539; People v. Jefferds, 5 Park. C. C. 518; Ex parte Stanley, 4 Nev. 113; Ex parte Santee, 2 Va. Cas. 363; Ex parte Jefferson, 62 Miss. 223; Ex parte State, 76 Ala. 482; Ex parte Ross, 82 Cal. 109, 22 Pac. 1086; Ex parte McGehan, 22 Ohio St. 442. A prisoner having smallpox is not entitled, of right, to be tried "at the same term": Commonwealth v. Jailer, 7 Watts, 366. In People v. Ruloff, 5 Park. C. C. 77, a comparatively early case, it was held that statutes authorizing the discharge of a prisoner if not brought to trial within the time specified by law are not statutes of limitation, and that a failure to comply with them would be a mere irregularity, not entitling him to a discharge on habeas corpus.

But, as we have shown above, the later and better considered decisions regard such statutes as imperative, and look upon them as intended to give effect to the clear constitutional right to a speedy trial: People v. Morino, 85 Cal. 515, 24 Pac. 892; People v. Matson, 129 Ill. 591, 22 N. E. 456. Habeas corpus is therefore, a proper remedy and available to a prisoner who has not been tried within the time prescribed by law, and his motion for a dismissal has been

improperly refused: *In re McMicken*, 39 Kan. 406, 18 Pac. 472; *In re Garvey*, 7 Colo. 502, 4 Pac. 758; *People v. Douglass*, 100 Cal. 1, 6, 84 Pac. 490; *Ex parte Vinton* (Cal., March, 1897), 47 Pac. 1019; *United States v. Fox*, 3 Mont. 512; *Rutherford v. State*, 16 Tex. App. 649; *State v. Brodie*, 7 Wash. 442, 35 Pac. 137. See, also, the concurring opinion of Beatty, C. J., in *Strong v. Grant*, 99 Cal. 100, 33 Pac. 722.

JACOBS v. SUPERIOR COURT.

[133 Cal. 364, 65 Pac. 828.]

A WRIT OF PROHIBITION TO ARREST PROCEEDINGS UNDER AN ORDER APPOINTING A RECEIVER DOES NOT LIE where the party aggrieved has a plain, speedy and adequate remedy at law. He has such a remedy, though a question of jurisdiction is involved, where the statute permits an appeal from such an order, and provides that the order may be stayed by an undertaking on appeal. (pp. 204, 205.)

W. R. Jacobs and C. S. Flack, for the petitioners.

C. H. Fairall, for the respondent.

S. M. Spurrier and J. G. Swinnerton, for the receiver.

Campbell, Metson & Campbell, for Gillis.

³⁶⁴ McFARLAND, J. This is an original petition here for a writ of prohibition to arrest all further proceedings upon a certain ³⁶⁵ order of the respondent the superior court appointing a receiver.

The appointment of the receiver was made in a certain action brought by one Gillis against one Galvan and others to foreclose a mortgage executed by Galvan and wife to Gillis on a certain tract of farming land. The order appointing a receiver authorizes him to take possession of said land, with the crops growing thereon, etc. The receiver took possession in accordance with the order, and ousted petitioners, who claim to have been in possession as lessees of the mortgagor, and to have had growing crops on the land.

Petitioners argue strenuously that, under the facts shown, they were owners of the growing crops; that the plaintiff in the action, being merely a mortgagee of the naked land, has no legal right, before foreclosure sale, to interfere, by receivership or otherwise, with their possession and control of said crops;

and that for these reasons, and other reasons given, the appointment of the receiver was unwarranted. On the other hand, respondents contend that the asserted lease was without consideration, intended merely to delay creditors, and void. But without examining into these questions, or determining whether or not the appointment of the receiver was proper and authorized by law, it is sufficient to say that this petition for prohibition cannot be sustained, because petitioners have "a plain, speedy, and adequate remedy in the ordinary course of law," within the meaning of section 1103 of the Code of Civil Procedure: *Agassiz v. Superior Court*, 90 Cal. 101, 27 Pac. 49; *Mines etc. Soc. v. Superior Court*, 91 Cal. 101, 27 Pac. 532; *Murphy v. Superior Court*, 84 Cal. 596, 24 Pac. 310; *Strouse v. Police Court*, 85 Cal. 49, 24 Pac. 747.

Formerly—and when *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, was decided—there was no appeal from an order appointing a receiver, but in 1897 (*Stata*. 1897, p. 55), section 939 of the Code of Civil Procedure was amended so as to allow such appeal, and, at the same time, section 943 was amended so as to provide for the staying of an order appointing a receiver by an undertaking on appeal. These amendments were apparently intended to afford a remedy for prodigal, unwise, and unwarranted appointments of receivers, which seems to be a growing evil; and we think that they do afford an adequate remedy, as contemplated by said section 1103, and the ~~see~~ decisions of this court on the subject. The fact that a question of jurisdiction arises does not change the rule as to the adequacy of the remedy by appeal: See *Agassiz v. Superior Court*, 90 Cal. 101, 27 Pac. 49.

The filing of the undertaking operates as a supersedeas, suspends all authority of the receiver under the order, withdraws from him the right to the control and possession of the property involved, and restores the same to the appealing party, from whom it has been taken: *Buckley v. George*, 71 Miss. 580, 15 South. 46; *State v. Johnson*, 13 Fla. 33; *Farmers' Nat. Bank v. Backus*, 63 Minn. 115, 65 N. W. 255; *Blondheim v. Moore*, 11 Md. 365.

In *Farmers' Nat. Bank v. Backus*, 63 Minn. 115, 65 N. W. 55, the court said: "The rights and powers of the receiver being suspended, of which he was duly notified, he should have restored possession of the premises to the appellant; for his authority to take being inoperative by the suspension, his authority to hold was equally so, both being derived from the same order.

The legal effect of the appeal and supersedeas was to withdraw from the receiver the right to the possession of the property, and vest that right in the party for whom it had been taken." In *State v. Johnson*, 13 Fla. 33, the court said: "No new rights having been created, and the duties of the receiver being superseded, the bond standing in place of the property in his hands, and he having been notified thereof by proper process, it was his duty to restore that which had come to his hands to the parties from whom it had been taken and withheld; for his authority to take being inoperative by the suspension, his authority to hold was equally so, both being derived from the same order." Therefore the appeal, and the undertaking thereon provided by our code, furnish, in nearly all cases, at least an adequate remedy in the ordinary course of law.

The case of *Los Angeles City Water Co. v. Superior Court*, 124 Cal. 385, 57 Pac. 216, appears, at first blush, to be an authority in support of petitioners' contention; but the first part of the syllabi, by inadvertence, gives an inaccurate statement of the decision. It was not there decided that an order improperly appointing a receiver would be annulled on certiorari, "notwithstanding the petitioner has appealed therefrom," and given a stay bond, as stated in the syllabi. The short opinion in the case shows that the petition was not to review an order appointing a receiver, but to review subsequent orders which had been ²⁰⁷ made by the superior court "after the petitioner had appealed to this court from an order of said superior court appointing a receiver, etc., and had given an undertaking to stay proceedings, in the amount fixed by the judge of said court." The merit of the case had already been decided on the appeal from the order appointing a receiver (see *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 57 Pac. 210, 571), and the point was, whether the court below, after an appeal from the order appointing a receiver, accompanied by a stay bond, had jurisdiction to make certain subsequent orders: See *Supreme Court Records*, vol. 2047, p. 253.

There might, perhaps, be exceptional facts in a case which would call for a writ of prohibition notwithstanding an appeal from an order appointing a receiver, but the general rule is as above stated, and applies to the case at bar.

The petition is denied, and the proceeding dismissed.

Temple, J., Van Dyke, J., Henshaw, J., Garoutte, J., and Beatty, C. J., concurred.

When a Writ of Prohibition Will Lie is discussed in the note to State v. Commissioners, 12 Am. Dec. 604-609. That the writ will issue to prevent the appointment of a receiver or of proceedings by a receiver where the court making the appointment is without jurisdiction or authority, see State v. Superior Court, 15 Wash, 668, 55 Am. St. Rep. 907, 47 Pac. 31; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121.

BENNETT v. WILSON.

[133 Cal. 379, 65 Pac. 880.]

APPEAL—LAW OF THE CASE.—A decision which simply determines that a judgment was void, because obtained by fraudulent collusion with the sheriff, cannot be regarded as the law of the case, on a subsequent appeal from a judgment on another trial, in which it was found that there was no such collusion, and that the service and return were made in good faith. (p. 212.)

JUDGMENT — COLLATERAL ATTACK — SERVICE OF SUMMONS.—A judgment regular on its face cannot be collaterally attacked for an irregular service of summons. (p. 212.)

JUDGMENT—COLLATERAL ATTACK BY ONE WHOSE RIGHTS WERE NOT AFFECTED.—A judgment regular on its face cannot be collaterally impeached by one whose rights could not have been affected thereby at the time of its rendition. (p. 213.)

JUDGMENT — COLLATERAL ATTACK, BY REDEMPTIONER, FOR IRREGULAR SERVICE OF SUMMONS.—When property is sold under execution, its redemptioner cannot, where no fraudulent collusion is shown, collaterally impeach a subsequent redemptioner's judgment, of a later date and regular upon its face, by showing that it was rendered upon an irregular service of summons, where the rights of the prior redemptioner, existing at the time of the subsequent redemptioner's judgment, were not affected thereby. (pp. 207, 214.)

L. N. Peter and W. W. Kellogg, for the appellants.

Goodwin & Webb, for the respondent.

²⁸⁰ **SMITH, C.** The case was before this court on a former appeal, on a judgment for defendants, rendered on demurrer to the complaint, which was reversed. The decision is reported in Bennett v. Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61, where the case is thus stated:

"The facts alleged which are necessary to illustrate the main question discussed by counsel may be briefly stated. Defendant company is a foreign corporation, and owned and operated mining property in Plumas county; defendant Bransford is sheriff of said county; defendant Wilson is a stockholder in

and the managing agent and in actual control and management of the property of defendant corporation; in 1895 one Swearingen obtained a judgment lien against the property of defendant corporation, which was sold on execution, and one Cole became the purchaser at sheriff's sale, July 18, 1896; the defendant corporation did not redeem; plaintiff obtained a judgment lien before the time of redemption expired, and with it redeemed from the purchaser, and sixty days thereafter demanded a deed from the sheriff, which was refused, for the alleged reason that defendant Wilson was a lawful redemptioner, and had within the sixty days required by law made redemption; Wilson's judgment lien was junior to plaintiff's. *It is alleged that Wilson's judgment was obtained by fraudulent collusion between him and said sheriff, whereby the sheriff made a false return of service of summons on defendant corporation; that no service was in fact made, and said corporation had no knowledge or notice of the action commenced by Wilson, and did not appear or answer, and judgment was obtained by default, and said judgment is fraudulent and void; plaintiff refused ³⁸¹ to accept the money tendered, and demanded a deed from the sheriff, which was refused."*

After the case was remanded, the plaintiff recovered judgment. The defendants Wilson and Bransford appeal therefrom, on the judgment-roll and bill of exceptions. The other defendant named in the complaint, the California Gold Mining and Investment Company, was not served with summons, and did not appear.

The following is an abstract of the judgments and proceedings out of which the controversy grows:

"Swearingen v. Cal. Gold. Min. & Inv. Co. Judgment for \$483.38, rendered June 17, 1895. Execution sale to L. M. Cole, Jan. 15, 1897.

"Bennett v. Same Dfdt. Judgment for \$642.96, rendered July 13, 1896. Redemption from sale to Cole, Jan. 15, 1897.

"Wilson v. Same Dfdt. Judgment July 17, 1896. Redemption from Bennett, March, 1897. The summons was served in this case on June 11, 1896, prior to the date of Bennett's judgment."

There is no allegation that the judgment was taken by Wilson with intent to defraud the plaintiff or to interfere with his rights, or with intent to defraud creditors, or that there was any fraud or fraudulent intent other than such as may be implied in the other facts as above stated.

On the trial the court found all the allegations of the complainant to be true, except the alleged fraudulent collusion between Wilson and the sheriff, on which point it found that the sheriff made the service on Fant, "then believing the said Fant to be the managing or business agent of said corporation."

On this state of the record, the appellants claim that "the findings being positively against the alleged fraud and collusion, this element is entirely eliminated from the case, and it follows that judgment should have gone for the defendant." On the other hand, the respondent claims that the question as to fraud and collusion is immaterial; that the "fraudulent acts charged are presented as the inducement leading to an imposition on the court—an imposition which procured a judgment against the corporation, which the court had no power to enter, for want of jurisdiction over the person" of the defendant. Hence it is claimed the judgment was void, on "principles not only elementary, but [that] have become the law of this case."

382 With regard to the former decision, we do not think it susceptible of the construction claimed by the respondent. In the statement of the case by the court the alleged fraudulent collusion between Wilson and the sheriff is given (in the passage italicized) a very prominent place, and in the course of the opinion it is repeatedly referred to in such a manner as to indicate that it was the ground of the decision. Thus in the opinion, the proposition that "said judgment is fraudulent and void" is stated, apparently, as the conclusion from the facts of the alleged collusion and nonservice, thus making it evident that the court understood the position of the plaintiff (then appellant) to be that the judgment was void because thus procured. And accordingly, on page 515 of 122 California (55 Pac. 391), the decision is based on the proposition that (on the facts alleged) the judgment was void as "obtained by fraud," and on page 516 the case is referred to as identical in principle with the case of a "judgment collusive between the debtor and creditor." The decision must therefore be regarded as resting on a principle that a judgment obtained by fraudulent collusion between the plaintiff and the defendant, or between the plaintiff and the officers of the law, may be collaterally attacked by persons not parties whose rights are affected. Hence the conclusion of the court that the plaintiff's right of action comes within the principles discussed by Mr. Freeman in his work on Judgments (sections 334-337, and the authorities there given), thus making the sections cited a part of the

opinion. Turning to these, we find the question proposed for discussion is to determine "when judgments not void for want of jurisdiction [i. e., not void on the face of the record (see *seca.* 116 *ad fin.*)], nor attacked by any equitable suit or defense, may nevertheless be wholly or partly avoided" by strangers to the record (section 334). Three cases are given in which this may be permitted, namely: 1. The case of parties "prejudiced [by the judgment] in regard to some pre-existing right" as in the examples given in section 335; 2. The case of judgments "procured through fraud of either of the parties, or by the collusion of both for the purpose of defrauding some third person" (section 336); and 3. That of judgments impeachable for error, "such as left the court without jurisdiction, and the judgment absolutely void as between the parties thereto" (section 337).

It is not to be supposed from the general citation of these ~~333~~ sections that the court intended to affirm that the case at bar came within all of the cases enumerated. The several sections are cited because the general question is discussed in them, and it is left to the reader (by aid of the maxim, "*Reddendo singula singulis*") to determine, from what is said in the opinion, the particular class treated of to which the case at bar is to be assigned. Of the classes enumerated, the first, it is obvious, must be rejected. Bennett's redemption from Cole was about six months after Wilson's judgment. At the time of the judgment he was merely a judgment creditor, his judgment antedating that of Wilson by four days. He was, therefore, in no way injured by the Wilson judgment, his own judgment being a prior lien. His right to attack the judgment must, therefore, rest upon his interest subsequently acquired as redemptioner from Cole, who himself purchased about six months after the judgment. The case, therefore, cannot be regarded as falling within this class, which includes only those whose rights existing at the date of the judgment are prejudiced thereby. Nor can the case be assigned to the second class. There is no allegation that the judgment was obtained "for the purpose of defrauding" Bennett, or anyone else; and as to Bennett, the facts of the case exclude the possibility of any such intent. When the judgment was rendered, Wilson was merely a judgment creditor, and when the summons was served (June 11th) he was not even that. Nor is there any allegation that the judgment was obtained by collusion between the parties for the purpose of defrauding creditors. On the contrary, it is expressly alleged that it was rendered with-

out the knowledge of the defendant corporation. There remains, therefore, only the third class—namely, that of judgments apparently valid, but in fact without jurisdiction, and “absolutely void as between the parties thereto.” And from the opinion itself it is clear that this was the class of cases referred to; for the judgment is therein uniformly described as void, and the decision is expressly based on the principle cited by the court, that “a void judgment is, in effect, no judgment.” “By it,” it is continued, “no rights are divested; from it no rights can be obtained. Being worthless itself, all proceedings founded upon it are equally worthless. It neither bars nor binds anyone”: Freeman on Judgments, sec. 117. In what is said by the author in this section, and in the authorities³⁸⁴ cited, we must therefore find the principles by which the former decision is to be explained and understood.

The rule laid down by Mr. Freeman in the section cited (337) is thus expressed: “The parties to an action or proceeding, and all persons who, though not parties thereto, are not prejudiced by the judgment when rendered, will not be permitted to assail or avoid it in any collateral proceeding for error or irregularity, unless it was such as left the court without jurisdiction, and the judgment absolutely void as between the parties thereto.” Such judgments, it seems, may be attacked by strangers to the record, whose rights, whether existing at the time of the judgment or afterward acquired, are affected—i. e., by persons who, not being parties to the record, or privies, have no remedy against the judgment, by appeal or otherwise, in the case itself. But, in general, they cannot be impeached otherwise than by the record itself, or where the lack of jurisdiction appears on the face of the record: *Hodgdon v. Southern Pac. R. R. Co.*, 75 Cal. 648, 21 Pac. 372; *Hill v. City etc. Co.*, 79 Cal. 188, 21 Pac. 728. Of this kind are all the cases cited by the author, and also the case of *Downs v. Fuller*, 2 Met. 135, 35 Am. Dec. 393, and other cases cited in the opinion in connection therewith. There are, however, some exceptions to this rule. *Ex vi termini*, living parties are essential to jurisdiction. Hence, when, at the time the judgment was rendered, the defendant was dead—as in the case of *Warter v. Perry*, Cro. Eliz. 199, and in *Randall’s Case*, 2 Mod. 308, cited in the opinion, and in *Griswold v. Stewart*, 4 Cow. 457—the jurisdiction is only apparent, and the fact may be shown by parties whose interests are injuriously affected. And so if a judgment be entered on a forged sheriff’s return, or by the clerk without authority; for such judgments are not in fact judgments of the

court. And on the same principle, collusive judgments may, in certain cases, be attacked by strangers. Hence judgments of this kind are included in this class by the author, in the section cited, being the same referred to in section 250, where they are more fully explained. To this class only, it is clear, can the opinion be understood as referring. Such cases are generally cases of collusion between the parties to the suit (*Pierce v. Jackson*, 6 Mass. 242; *Fermor's Appeal*, 3 Coke, 77; *Meckley's Appeal*, 102 Pa. St. 541; *Biddle v. Tomlinson*, 115 Pa. St. 299, 8 Atl. 774; *Sponsler's Appeal*, 127 Pa. St. 410, 27 Atl. 1097; *Freeman on Judgments*, sec. 335); but, though not including in their literal expression the case at bar, they are expressly referred to in the opinion (*Bennett v. Wilson*, 122 Cal. 514), as identical with it in principle. The decision must therefore be regarded as determining only that the judgment of Wilson against the corporation was (on the allegations of the complaint) void because obtained by him by fraudulent collusion with the sheriff, and hence that it was not a real or "bona fide existing judgment," or "actual adjudication upon the matter in controversy": *Spencer v. Vigneaux*, 20 Cal. 449. And as it is now found, there was no such collusion, but that the service and return were made by the sheriff in good faith, the decision cannot be regarded as the law of the case as now presented.

The case must therefore be considered on general principles, and in thus considering it, it will be convenient to consider separately the general question as to the effect of a judgment regular on the face of the record, where there has been in fact no service of summons, and the question as to how the case may be affected by the peculiar circumstances presented by it.

1. As to the general question, the law is well settled. No doubt the court must have jurisdiction of the person of the defendant; but—with exceptions that have been considered—such jurisdiction, in the case of courts of record, is conclusively presumed, unless the contrary appears from the record itself. And where, as in this case, it appears from the return of the proper officer that the defendant has been served, the court in fact has jurisdiction over him: *Reinhart v. Lugo*, 86 Cal. 399, 21 Am. St. Rep. 52, 24 Pac. 1089; *Lyons v. Cunningham*, 66 Cal. 43. For jurisdiction is but power to hear and determine the questions arising in the case, and among these is the question whether the summons has in fact been served. Its judgment, therefore, unless on a direct proceeding to set it aside, or in the exceptional cases already considered, must be taken as a conclusive determination of this question.

On this point the language used in *Downs v. Fuller*, 2 Met. 393, 35 Am. Dec. 393 (cited in the former decision), and similar cases, is liable to be misunderstood: *Freeman on Judgments*, sec. 337, p. 612; *Van Fleet on Collateral Attack*, sec. 12, pp. 11, 12. It is there said: "Although the judgment in favor of the plaintiff was ~~not~~ not recovered by collusion with his debtor, or with any fraudulent intent, yet we think the defendant has a right to avoid it in the same manner, because he is neither party nor privy to the plaintiff's judgment, and is not entitled by the rules of law to reverse it by writ of error." But this does not mean that a judgment may be attacked by all strangers to the record; it applies only to cases "where a party has a right to impeach a judgment"—as in the case considered; where the rights of the party existing at the date of the judgment were affected; and where the defeat of jurisdiction appeared from the record itself.

2. In this case, there is no charge of collusion between the parties to the suit; and it is found that there was no collusion between Wilson and the sheriff; and it affirmatively appears that the judgment did not affect, and indeed could not have affected, the rights of the plaintiff existing at the time of its rendition. The findings, therefore, that the service of the summons was a wrong, "against the rights of the plaintiff," and that the "judgment was a fraud upon the rights of the plaintiff as a redemptioner of said property," are in conflict with the specific facts found, and must be disregarded; for it appears from the admitted allegations of the complaint that at the time of the service of summons Bennett was not even a judgment creditor, and therefore could not be defrauded by the service of summons, and, also, that he did not become a redemptioner until six months (lacking two days) after Wilson's judgment, which, therefore, could not be a fraud upon rights not then existing. The material facts found, therefore, are merely that Wilson was, and Fant was not, the managing agent of the company; that with the knowledge of Wilson, and by direction of his attorney, the summons was served on the latter by the sheriff, believing him to be the managing agent of the corporation; and that the judgment was demanded, and entered on sheriff's return. These facts are not sufficient to bring the plaintiff within any class recognized by the authorities as entitled to impeach a judgment regular on its face. It is ingeniously put by the respondent's counsel that the entry of the judgment was "an imposition on the court." But this was not the case. The judgment was entered by default by the clerk, whose legal duty it was to enter it, and who

had no discretion in the matter. Nor, had there been such imposition, would it have been any concern of the ³⁸⁷ plaintiff. The relations of Wilson to the corporation, in the absence of explanation, might give rise to a presumption of fraud against it. But fraud against the corporation, even had it been found, would not entitle the plaintiff to impeach the judgment: Meckley's Appeal, 102 Pa. St. 536; Sponsler's Appeal, 127 Pa. St. 410, 17 Atl. 1097; Biddle v. Tomlinson, 115 Pa. St. 299, 8 Atl. 774.

Under the view we have taken of the case, it will be unnecessary to examine into the sufficiency of the evidence to support the findings.

I advise that the judgment be reversed and the cause remanded, with directions to the court below to enter judgment for the defendants on the findings.

Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to enter judgment for the defendants on the findings.

Temple, J., Henshaw, J., McFarland, J.

Hearing in Bank denied.

Judgments.—As against a collateral attack on the ground that the summons was insufficient, it must be presumed in favor of the judgment that another and sufficient summons was issued: *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20, 42 Pac. 525; *Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214, 58 N. E. 304. See, also, in this connection, *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 931; *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359. As to the right of a third person to attack a judgment collaterally, see *Downs v. Fuller*, 2 Met. 135, 35 Am. Dec. 393; monographic note, *Morrill v. Morrill*, 23 Am. St. Rep. 116.

OLSEN v. BIRCH & CO.

[133 Cal. 479, 65 Pac. 1032.]

SHIPPING—CONSTITUTIONAL LAW—STATUTE CONCERNING ACTIONS AGAINST VESSELS.—The statute of California, concerning "actions against steamers, vessels, and boats" does not conflict with section 2, article 3 of the federal constitution, which declares that "the jurisdiction of the federal courts shall extend to all cases of admiralty and maritime jurisdiction," or with section 711 of the United States Revised Statutes, declaring that "the jurisdiction of the federal courts of cases of admiralty and maritime jurisdiction is exclusive, saving to suitors in all cases the rights of a common-law remedy where the common law is competent to give it," and is not invalid though a suit might be brought under it of which the state courts would have no jurisdiction. (p. 216.)

SHIPPING. — A STATE STATUTE GIVING A LIEN AGAINST STEAMERS, vessels, and boats is valid though no action can be brought under it in the state courts. (p. 216.)

SHIPPING.—MARITIME CONTRACTS HAVE REFERENCE TO NAVIGATION upon the sea, and in some way to vessels actually being used in commerce or in navigation. (p. 216.)

SHIPPING—MARITIME CONTRACT—WHAT IS NOT.—A claim for work done in the construction of a steamship, not employed in navigation and which has never been so used, or for services rendered by the crew thereon, does not arise out of a maritime contract. Hence, a state court has jurisdiction to enforce liens under the state law for the work done, where the vessel has not been seized. (pp. 217, 218.)

ADMIRALTY—ACTION IN REM—WHAT IS NOT.—An action to foreclose a lien against a defendant personally, unaccompanied by seizure or constructive service of process, is not the action in rem used in courts of admiralty. (p. 219.)

SHIPPING—PLEADING—VESSEL ENGAGED IN COMMERCE.—An averment that services sued for were rendered aboard a vessel as members of her crew is not necessarily an allegation that the vessel was engaged in commerce. (p. 219.)

APPEAL—REVERSAL OF JUDGMENT—AMENDMENT OF COMPLAINT.—A judgment will not be reversed because a special demurrer to the complaint on the ground of ambiguity was improperly overruled, where the complaint could easily have been amended, and the defendants were not injured. (p. 220.)

E. L. Campbell and J. S. Spilman, for the appellants, Birch & Co.

Reddy, Campbell & Metson, for the appellant, the Yukon and Northwestern Dredging and Transportation Company.

H. W. Hutton, for the respondent.

480 TEMPLE, J. This action was brought to foreclose liens upon the steamship "City of Dawson," which was constructed at San Francisco in 1898, by the appellants, as owners. The complaint contains three causes of action. The first is for two hundred dollars, due plaintiff for services in the construction of the ship. The other two are upon assigned claims. One is a claim of Frank Green for services as chief engineer, rendered on board said steamship, and "as a member of her crew." The other is the claim of A. R. F. Brandes, a freight clerk, rendered on board said steamship, as a member of her crew.

It was found that the services of plaintiff were rendered in building a house on the steamship, and the services of Green were rendered while the steamship was "not engaged in active operation, and was not in commission." It was found that Brandes performed service as freight clerk for the Yukon and Northwestern Dredging Company, but the service was not performed on said steamship, nor as a member of her crew, or for her.

481 The other defendant was found to have a claim against the ship, for constructing the same, but no judgment was rendered in favor of said defendant.

The first two points raised by the appellants may be considered together, and practically they are: 1. That the law is invalid, as in conflict with section 2 of article 3 of the constitution of the United States, which declares that the jurisdiction of the federal courts shall extend to all cases of admiralty and maritime jurisdiction; and 2. That jurisdiction of the state courts is forbidden by section 711 of the Revised Statutes of the United States. This statute declares that "the jurisdiction of the federal courts of cases of admiralty and maritime jurisdiction is exclusive, saving to suitors in all cases the rights of a common-law remedy where the common law is competent to give it."

The statutes here called in question are certain sections of the Code of Civil Procedure: Code Civ. Proc., sec. 813 et seq. The matter is the more interesting because (as is well known to the writer of this opinion) these sections were carefully revised by the late Stephen J. Field after and in view of the decisions in *The Moses Taylor*, 4 Wall. 431, and *The Hine v. Trevor*, 4 Wall. 571; and in the report of the so-called code revisers, which was written by Judge Field, the claim was made, that for the first time these sections had been made valid. But I think we need not enter very fully into this discussion. The code provisions are certainly not invalid, although a suit might be

brought under them of which the courts of the state would have no jurisdiction. If the claim sued upon was one arising from a maritime contract, and the owners were unknown, or if the owner could not be found, and the summons was only served upon the master, mate, or other person in charge of the vessel, a serious question would be presented. But here the owner has appeared and answered, and the action is against him by name, and the claim asserted did not arise upon a maritime contract. And it may be added, the suit is not a proceeding in rem. And, of course, the statute giving the right to a lien would be perfectly valid, although no action could be brought under it in the state courts.

The claim did not arise from a maritime contract. The vessel had never been in commission, or in active use in navigation. Maritime contracts have reference to navigation upon ^{the} sea, and in some way to vessels actually being used in commerce, or at least in navigation.

Counsel agree that liens to secure claims of those who have contributed to the construction of vessels are nonmaritime, but appellants seem to contend that because the findings state that the labor of plaintiff was performed in the construction of a house upon the "City of Dawson," and the assignors of the other claims rendered their services as members of the crew on board the vessel, the vessel was complete before the services were rendered, and, therefore, the liens are for securing maritime contracts. It is found that the vessel had not been used in navigation. It seems true, that if the vessel was employed in navigation, it would still have been at least doubtful whether the contract for the construction of the house was a maritime contract, but the vessel not being at the time employed in navigation, and never having been so engaged, the contract was not maritime. This is completely settled by the case of *Williams v. The Sirius*, 65 Fed. 226, and by the authorities quoted by the learned judge in that case. The libelant there claimed a lien under these provisions of our code, for services rendered as watchman, or shipkeeper. The vessel had been engaged in commerce, but was sold in San Francisco under a venditioni exponas issued from the district court. It was a British ship, but had not been enrolled as an American vessel after the sale, and was not in commission. After reviewing the authorities, the court was unable to hold that the services were of a maritime character, and therefore there was no lien, under our state law, cognizable in a court of admiralty.

"The Sirius" had been engaged in navigation, but was laid up in her home port, and was unregistered and out of commission. The point of the decision seems to be, that the services, though rendered on the vessel, were not in furtherance of navigation, but were to preserve the vessel.

A few authorities apparently holding a contrary doctrine are cited by appellants: *The Eliza Ladd*, 3 Saw. 519, Fed. Cas. No. 4364; *The Revenue Cutter No. 2*, 4 Saw. 143, Fed. Cas. No. 11,714; *The Manhattan*, 46 Fed. 797.

The reasoning in the cases is similar, but *The Manhattan*, 46 Fed. 797, is the more elaborate, and apparently most relied upon. In that case the hull was first built under contract and then floated to a different point, where the ship was completed under a new contract. Proceedings in rem were instituted ⁴⁸³ to recover upon this contract, and the jurisdiction of the district court was challenged on the ground that the contract was not of a maritime character. Judge Hanford referred to the fact that contracts for building ships are not maritime, while contracts for repairing and rebuilding ships are. And he said (correctly, I think) that it could make no difference whether the same work was done upon a new hull or an old hulk, and then added: "After a new ship has been launched and embraced by the element upon which she is intended to float, and been christened, and become an entity fully capable of being identified, she is as much a subject of admiralty and maritime jurisdiction as she can be at any later period of her history; and contracts then entered into relating to her completion, equipment, or employment are maritime, and cognizable in admiralty."

Evidently there is here a misapprehension as to the basis of admiralty jurisdiction. It does not extend to ships, merely because they are ships, but to commerce and navigation, and to ships only because they are, and while they are, used in commerce and navigation. A ship, while building, is not an instrument of commerce, nor is she while out of commission, and being cared for to preserve her for possible future use. A ship injured by use, and only temporarily laid up for repairs, or being refitted that she may resume her voyage, is considered still engaged in commerce.

But this suit is not a proceeding in rem. Had the contract been maritime, a proceeding in rem could have been had in the district court; nevertheless, if a common-law remedy could have been made available, such remedy could have been

afforded by the state court. Here the action is against the owner, and such owner has appeared and answered. The vessel was not seized, and there was actual service of summons. The main difference between an action in rem and an action in personam is indicated by the two phrases. One is against the thing as the defendant, and the judgment is that the thing is indebted; and, furthermore, the res is taken possession of and held by the court, and its jurisdiction depends upon such possession and holding. Here, the judgment is against the owner, and the sale of the property, if one is had, will be like an ordinary sale under execution.

Such proceedings are said to be quasi in rem, which phrase has become quite common since *Pennoyer v. Neff*, 95 U. S. 714. ⁴⁸⁴ It is there said that such proceedings are not strictly in rem, because they are not against the thing as debtor. The subject is discussed by Waples on Proceedings in Rem, chapter 56. And the right to maintain such suits in the state courts has been upheld by the supreme court of the United States: *Leon v. Galceran*, 11 Wall. 185; *Johnson v. Chicago Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. Rep. 254; *The Glide*, 167 U. S. 606, 17 Sup. Ct. Rep. 930. In the last case the jurisdiction of courts of admiralty was sustained, but the law required the suit to be against the vessel, and provided for a seizure of the ship through attachment. The court says of the proceeding in rem: "While the proceeding differs thus from a common-law remedy, it is also essentially different from what are, in the west, called suits by attachment, and in some of the older states, foreign attachments. In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of nonresidence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to a sale in a common-law court of the state." The foreign attachment suits here referred to are the proceedings quasi in rem, elsewhere alluded to. In such case, when the defendant is personally served, or appears in the case, the suit is really an ordinary action in personam. The act of Congress did not have the effect of denying to state courts jurisdiction, except to enforce the action in rem, as that action was known to courts of admiralty. An action to foreclose a lien against the defendant

personally, unaccompanied by seizure or constructive service of process, was not the action in rem in use in courts of admiralty.

The objection special to the judgment upon the assigned claims is, that the allegation is that such services were rendered on board the vessel, and as members of her crew, which, it is said, is an allegation that the vessel was engaged in commerce. That may be admitted to be the most obvious and ordinary meaning of the language. But the words may be also applied, as the findings show they were here, to a force put on board a vessel to care for it, before the ship has been enrolled or is in ⁴⁸⁵ commission, merely for the preservation of the ship. Perhaps there was an ambiguity which was reached by special demurrer, but the complaint could easily have been amended. And if the court improperly refused to sustain such demurrer, and the complaint was therefore not amended, it is perfectly obvious, in this case, that the defendants were not, and could not have been, injured.

Judgment affirmed.

McFarland, J., and Henshaw, J., concurred.

Shipping.—A Contract for Building a Ship or supplying material for its construction is not a maritime contract: *The Victorian*, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040; *The Scow M. Tuttle v. Buck*, 28 Ohio St. 565, 13 Am. Rep. 270, and note.

Shipping.—Liens and proceedings to enforce contracts for the construction of ships and furnishing materials therefor may be enforced in state courts: *Globe Iron Works Co. v. Steamer John B. Ketcham* 2d, 100 Mich. 583, 43 Am. St. Rep. 464, 59 N. W. 247; *The Victorian*, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040. And a state statute providing therefor is valid: *Scatcherd Lumber Co. v. Rike*, 113 Ala. 555, 59 Am. St. Rep. 147, 21 South. 136. A statute creating a lien against vessels for repairs in their home port is valid: *Atlantic Works v. Tug Glide*, 157 Mass. 525, 34 Am. St. Rep. 305, 33 N. E. 163. But see the note thereto, 34 Am. St. Rep. 309, 310; and consult, also, the note to *The Scow M. Tuttle v. Buck*, 13 Am. Rep. 273-276.

CUSSEN v. SOUTHERN CALIFORNIA SAVINGS BANK.

[133 Cal. 534, 65 Pac. 1099.]

BAILMENT — SAFE DEPOSIT — CARE REQUIRED OF BAILEE.—When a box in a safe deposit vault is rented, the relation between the parties is that of bailor and bailee. The latter is bound to exercise ordinary care in the preservation of the property, unless it has been waived by special agreement. (p. 221.)

BAILMENT—SAFE DEPOSIT—WAIVER OF ORDINARY CARE.—An agreement, by a bank, in renting a box in its safe deposit vault, that it shall not be liable further than to use diligence that no unauthorized person shall be admitted to any rented safe, simply fixes the degree of care to be used in identifying parties, and is not a waiver of that degree of care imposed by law upon a bailee for hire. (pp. 221, 222.)

BAILMENT—LOSS OF SAFE DEPOSIT.—If the money of a person who has rented a box in a safe deposit vault is abstracted while on deposit therein, and he sues for its recovery, he makes out a prima facie case by showing the deposit and its subsequent loss. The burden of proof is then cast upon the defendant of showing that it used proper care in the safekeeping of the plaintiff's property. (p. 222.)

BAILMENT—SAFE DEPOSIT.—NEGLIGENCE IN GUARDING a deposit in a safe deposit vault is established by evidence that the bailee failed to turn over to the renter of the box both of the keys which unlocked it; and that the money was abstracted from the box while the vault was in the charge of boys, who were paid small salaries and of whose honesty the defendant was ignorant. (p. 223.)

BAILMENT—SAFE DEPOSIT COMPANY—LIABILITY OF, FOR NEGLIGENCE AND ITS EXTENT.—A statute declaring that "the liability of a depository for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth" does not shield a safe deposit company from liability for the actual value of a deposit lost by its negligence, as such statute is inapplicable by reason of the peculiar nature of the safe deposit business. (p. 223.)

Goodrich & McCutchen and J. S. Chapman, for the appellant.

Joseph Scott and Anderson & Anderson, for the respondent.

⁵³⁵ GAROUTTE, J. Defendant carried on a safe deposit business. Plaintiff rented a safe in its deposit vaults for the period of one year, and deposited therein a sum of money. Upon a subsequent visit to the vaults he discovered that five hundred and sixty dollars of his money had been abstracted. He has recovered judgment against defendant for that amount, and this appeal is taken from that judgment.

The relation between these parties was that of bailor and bailee. The defendant was a depository for hire: Roberts v. ⁵³⁶

Stuyvesant Safe Deposit Co., 123 N. Y. 57, 20 Am. St. Rep. 718, 25 N. E. 294; Lockwood v. Manhattan Storage Co., 50 N. Y. Supp. 974, 28 App. Div. 68. The relationship of bailment for hire existing, it devolved upon defendant to use ordinary care in the safeguarding of plaintiff's property. The law demands the exercise of that degree of care by defendant in the preservation of his property, unless by some special agreement it has been waived. We find nothing in this contract pointing in that direction.

It is insisted that subdivision 7 of the agreement entered into between these parties amounted to a waiver of liability. That provision declares: "The lessor shall use diligence that no unauthorized person shall be admitted to any rented safe, and beyond this the lessor shall not be responsible for the contents of any safe rented from it." In considering this clause of the contract, defendant declares its construction to be: "The word 'admitted,' therefore, defined by the facts and circumstances attendant upon the making of this contract, and in connection with the contract itself, refers to such persons as might be admitted to the safe deposit vaults in the usual course of the business, and under the rules and regulations of the bank; and the admission of any 'unauthorized' person therefore refers to a person gaining access to the box in the usual course of business, when in fact he had no right to do so. And the diligence to be exercised by the bank was to guard against false impersonation and forgery by a person claiming to be a renter or a deputy." Adopting this construction of the contract as the correct one, then the court is assured that the balance of the clause, "and beyond this the lessor shall not be responsible for the contents of any safe rented from it," only refers to its liability as to those persons "admitted" to the safe, as the word "persons" is defined by defendant's construction of this clause. Under the construction of this clause as contended for by defendant, it could open wide the doors of its vaults, leave the building without any protection whatever, and thereafter, by invoking this provision of the contract, relieve itself of liability for the property of depositors stolen therefrom by thieves. This position is not maintainable in law, and the aforesaid clause was only intended to fix the degree of care required to be exercised by defendant, not in guarding the property placed in its charge, but in the identification⁵³⁷ of parties claiming to be its customers. It follows, therefore, that the defendant was called upon by the law to use that de-

gree of care in the safekeeping of this property which is demanded from a bailee for hire in the keeping of valuable property. It was required to use that degree of care in the protection of this property from thieves without and thieves within, and it was required to use that same degree of care in the selection of its employes, and in the supervision of their conduct after they were employed.

It is said in *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. Rep. 162: "Persons, therefore, depositing valuable articles with them expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, . . . and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor": See, also, *Gray v. Merriam*, 148 Ill. 179, 190, 39 Am. St. Rep. 172, 35 N. E. 810.

In this case it was established by plaintiff's evidence that his money was abstracted from the vaults of defendant while on deposit. Under these circumstances the burden was cast upon defendant of showing that it used proper care in the safekeeping of the plaintiff's property. In *Lockwood v. Manhattan Storage Co.*, 50 N. Y. Supp. 954, 28 App. Div. 68, it is said: "The ordinary rule established by numerous authorities is, that when plaintiff has proved the deposit of his goods, and a failure of the defendant to produce the same on demand, he has established a *prima facie* case, and the defendant must excuse his failure to produce, by bringing himself within one of the recognized exceptions": See, also, *Clafin v. Meyer*, 75 N. Y. 262; 31 Am. Rep. 467.

If plaintiff made a *prima facie* case by showing a deposit of the money and its subsequent loss, then, as to the facts, the only question remaining is, Was the jury justified in declaring that defendant failed to use the care demanded by the law in the protection of plaintiff's property? Clearly, as matter of law, this court cannot say that defendant used that degree of care. And the finding of fact by the jury as to want of care ⁵³⁸ cannot be set aside by this court as being without support in the evidence. The jury was fully justified in declaring defendant wanting in the exercise of proper care when it failed to deliver to plaintiff both of the keys which unlocked his box, thus

leaving outstanding in the hands of some one a key to the box. In addition to this fact, the evidence discloses that these safety deposit vaults for a long period of time were left in charge of one Burgwald, a lad about seventeen years of age, whose salary was thirty dollars per month. It was developed that he had been in the employ of defendant but three months, when he was placed in charge of the deposit vaults. It was further shown that he left the employment of defendant before plaintiff's loss was discovered, and that no inquiry was ever made by defendant, prior to or during his employment, as to his honesty or integrity. The jury might well say that proper care was not exercised in the selection and retention of this employé. A second lad, who was working for a salary of twenty-five dollars per month, also had charge of these vaults a portion of the time, and substantially all that has been said as to Burgwald may be said of this second employé. Upon this character of evidence we are satisfied with the verdict of the jury as to the facts involved in the case.

Section 1840 of the Civil Code declares: "The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth." Defendant relies upon this section of the code, but in its provisions we see no relief for it. Here, plaintiff did not inform defendant as to the value of the deposit. Neither does defendant claim that it had reason to suppose the thing deposited was of less value than it was in fact. Indeed, the very manner of conducting this somewhat peculiar line of business contemplates that the bailee shall not know the value of the thing deposited. In substance, he closes his eye to the value and character of the deposit, and this fact seems to be one of the controlling features in the transaction of this character of business. Under the circumstances, it is apparent that section 1840 of the Civil Code can have no application to the facts of this case.

In view of what has been said upon the various questions discussed, it follows that the action of the trial court, of which ⁵³⁹ complaint is here made, in the giving and refusing certain instructions, was correct.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

Bailment.—A safety deposit company is a bailee for hire, and is bound to exercise ordinary care in the preservation of property intrusted to it. Ordinary care in such case is such as every prudent man takes of his own goods: *Mayer v. Brensinger*, 180 Ill. 110, 73 Am. St. Rep. 196, and note, 54 N. E. 159.

Bailment.—The burden of proof, as between bailor and bailee, is as follows: The bailor must prove the contract of bailment and the delivery of the goods; then the bailee, if he wishes to exonerate himself from liability for their loss, must show the fact and manner of loss; and the bailor must assume the burden of establishing that the loss was due to the negligence of the bailee: *Lancaster Mills v. Merchants' etc. Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 817. See, further, on this question, *Knights v. Piella*, 111 Mich. 9, 68 Am. St. Rep. 375, 69 N. W. 92; *James v. Orrell*, 68 Ark. 284, 82 Am. St. Rep. 293, 57 S. W. 931; *Hildebrand v. Carroll*, 106 Wis. 324, 80 Am. St. Rep. 29, 82 N. W. 145.

PEOPLE v. STOCKTON SAVINGS AND LOAN SOCIETY.

[133 Cal. 611, 65 Pac. 1078.]

ESCHEAT OF REAL PROPERTY, WHEN NOT PROVIDED FOR BY A CONSTITUTION.—A mandatory provision of a constitution against holding real estate for a longer period than five years, except such as may be necessary for carrying on the business of a corporation, which fails to declare what results shall follow a violation of the provision, does not accomplish an escheat of property held by a corporation for more than five years without a sale. (p. 225.)

ESCHEAT—LAND HELD BY A CORPORATION FOR MORE THAN FIVE YEARS.—Under a constitution which provides that no corporation shall hold any real estate for a longer period than five years, except such as may be necessary for carrying on its business, and a statute which provides that lands purchased by a corporation under pledges, mortgages, or deeds of trust made for its benefit, must be sold within five years after title has vested, no action can be maintained to escheat to the state lands held by a savings and loan association, on the ground that it has held them for more than five years without sale. (pp. 225, 226.)

Tirey L. Ford, attorney general, and J. F. Ramage, for the appellant.

Nicol, Orr & Nutter, for the respondent.

GAROUTTE, J. The object of this action is to escheat to the state certain lands in San Joaquin county, alleged to be held by defendant, a corporation. The complaint alleges that the defendant acquired at trustee's sale, made pursuant to the provisions of a certain deed of trust, these lands; that more

than five years have elapsed since defendant acquired title thereto, and said lands have not been sold. The sufficiency of the complaint is the only question before the court.

The action is based upon section 9 of article 12 of the constitution of the state, which provides: "No corporation shall engage in any business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized; nor shall it hold for a longer period than five years any real estate, except such as may be necessary for carrying on its business." It is asserted by appellant that this provision of the constitution being mandatory and prohibitory, it follows therefrom that defendant's title to these lands was cut off instantaneously, upon the expiration of the five year period, and, as a necessary result therefrom, the land escheated to the state. The court fails to see how the declaration of the constitution to the effect that this provision is mandatory and prohibitory accomplishes an escheat under the facts of this case. The provision of the instrument says nothing whatever about escheats. Escheats and forfeitures are not favored by the law, and why some penalty, other than an escheat, should not be declared to follow a violation of this provision of the constitution is not made plain. The provision itself wholly fails to declare what results follow if it be violated. And for this reason it seems that the legislature has the power to prescribe penalties for its violation. There appears nothing in the provision so self-executing as to deny that power.

A provision of the Pennsylvania constitution, similar in principle to that here involved, was before the appellate court of that state in *Commonwealth v. New York R. R. Co.*, 132 Pa. St. 605, 19 Atl. 291, and the court there said: "It will be noticed that this clause in the constitution affixes no penalty for its violation. It is ⁶¹³ conceded that for a violation of the organic law a Pennsylvania corporation, or a foreign corporation having or exercising corporate franchises within this commonwealth, would forfeit such franchises. This, however, would not involve an escheat or confiscation of its property. For present purposes we must regard this constitutional provision as out of the case. The question here is, whether the real estate in controversy is liable to escheat. This is not a proceeding to forfeit the company's franchises, but to escheat its lands."

As to savings and loan societies, this provision of the constitution is given a legislative construction by section 574 of the Civil Code, wherein it is provided: "Savings and loan cor-

porations may purchase, hold, and convey real and personal property as follows: 4. No such corporation must purchase, hold, or convey real estate in any other case or for any other purpose; and all real estate described in subdivision 3 of this section must be sold by the corporation within five years after the title thereto is vested in it by purchase or otherwise."

Subdivision 3 relates to real estate purchased by the corporation under pledges, mortgages, or deeds of trust, made for its benefit. It is here provided that the lands must be sold within five years after title has vested; and the court feels satisfied that such is the purpose and tenor of the constitutional provision, when it declares that a corporation shall not hold certain classes of real estate for a longer period than five years. In other words, the constitutional provision declares that this character of real estate shall be sold within the five year period. If the corporation does not sell, as commanded by the constitution, penalties may be provided by the legislature for its failure so to do; or, possibly, some judicial procedure might be invoked, compelling a sale of the land or a forfeiture of its franchise.

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

What Amounts to an Escheat is considered in the note to Commonwealth v. Hite, 29 Am. Dec. 232-235.

The Capacity of Corporations to Take and Hold Title to realty is discussed in the note to Page v. Heineberg, 94 Am. Dec. 881-887.

NELLIS v. RICKARD.

[188 Cal. 617, 66 Pac. 82.]

TRUSTS.—A BENEFICIARY MAY BE A TRUSTEE without invalidating the trust. Hence, the appointment of a daughter as trustee, in a deed of trust from her father, does not invalidate a trust which secures to her the entire income of the trust property for life. (pp. 228-231.)

TRUSTS—WHEN SEVERABLE—UPHOLDING OF VALID PART.—An express trust in a deed of trust, securing to the trustor's daughter the entire income of the trust property for life, is severable from a further trust therein giving to her children, or the issue thereof, upon her death, the benefit of the net income of the property, until a certain period, when the fee is to vest in the survivors. Hence, the former trust, being valid, should be upheld, irrespective of the latter's validity. (pp. 228, 232.)

Page, McCutchen & Eells, Charles P. Eells, and John Garber, for the appellants.

Freeman & Bates and William H. Chapman, for the respondent.

617 CHIPMAN, C. Action to quiet title. Plaintiff had judgment, from which and from the order denying motion for new trial defendants appeal.

Defendant Mattie S. Rickard claims title under deed of trust from her father, Dr. Richard H. McDonald, to her, June 27, 1891. She was at the time the wife of John C. Spencer, and had four children living, and they are still living. She had no other child. These children were born respectively, on the following dates: November 28, 1879; October 10, 1881; October 15, 1883; March 15, 1885. She was divorced from **618** Spencer, and married her codefendant, Kenneth C. Rickard, with whom she is now living. Dr. McDonald was a member of his daughter's household in June, 1891. Plaintiff was a judgment creditor of McDonald, and claims under execution sale and sheriff's deed of date subsequent to 1891. The deed of trust is between Dr. McDonald, party of the first part, and Mattie S. Spencer, party of the second part, and recites that Mrs. Spencer (now Mrs. Rickard) is the grantor's daughter, and that "in consideration of the affection which the party of the first part has for her children, and the trust reposed in her, he does by these presents give, grant, and convey unto the party of the second part [the lands in controversy], to have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, in trust, for the uses and purposes herein set forth, and none other, to wit, to possess, control, and have the income of said property during the natural life of the said party of the second part, and upon her death, then the net income of said property shall belong to her children, share and share alike, except in case of the death of any such child or children leaving issue, then the share otherwise going to such child or children shall go to the issue of such child or children, until the youngest child of the party of the second part arrives at the age of twenty-five years, thereupon the said property shall vest in fee, share and share alike, in said children, and the issue of the aforesaid child or children, if any there be. The said party of the second part, or her aforesaid successors, shall have no power to alienate, encumber, or create a lien on said property, or to lease the same for

a term to exceed five years, and the income of said property shall be paid monthly."

To rescue the deed entirely from the operation of the statute against perpetuities, or if this cannot be done, to give it effect to some extent, appellants contend: 1. That the deed conveyed the legal life estate to the grantor's daughter, Mrs. Spencer, free of any trust; and, if a trust was created, Mrs. Spencer's interest is severable from the trust for the children, and would not be affected by any invalidity of the latter trust; 2. If the deed created a trust of the remainder after the life estate, it was for the benefit only of children living at the date of the deed, and therefore did not contravene the statute; but even if it included after-born children, it may be construed as limiting its benefits to children in being, and it is the duty of ^{§19} the court so to construe the deed, if thereby a violation of the statute may be prevented; 3. That no trust was created for the children, but the title vests in them at the mother's death, subject, at most, to certain restrictions on their mode of enjoyment until the youngest shall have arrived at the age of twenty-five years; 4. If the deed attempted to create a trust of the remainder for all the children of Mrs. Spencer, and such trust would be void, still the gift to the children takes effect, and will be upheld, the trust being disregarded; that in no aspect of the deed was any interest or reversion left in McDonald, or acquired under execution sale against him.

It is undoubtedly true, as a general proposition, that where an equitable estate and a legal estate meet in the same person, the former is merged in the latter, if the two estates are commensurate and coextensive, and if the merger is not contrary to the intention of the parties: Lewin on Trusts, *14, *665; Perry on Trusts, secs. 13, 347. And, ordinarily, a cestui que trust should not be appointed trustee. But the authorities hold that a cestui que trust is not absolutely incapacitated from being a trustee, "as the court itself, under special circumstances, appoints a cestui que trust a trustee. The question is one merely of relative fitness": Lewin on Trusts, *665; Perry on Trusts, secs. 59, 297, and cases cited; Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196, where a trustee was also a beneficiary.

Respondent contends that there could be no merger in this case, because the beneficiary takes no interest in the estate, and there was no estate to merge, the entire legal and equitable title passing by the deed to the trustee, the beneficiary having only

the right to have the trust enforced: *In re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, and note, 41 Pac. 772.

It is not necessary to decide these questions. We think a trust was intended to be created, and was created, but it is not a single trust, constituting an indivisible scheme for the disposition of the grantor's property, and incapable of being considered by its several parts. The deed establishes: 1. A trust for the benefit of Mrs. Spencer, by which she was to have the incomes of the property during her natural life, and the only restraint put upon her related to the disposition of the corpus of the estate; there was no restriction whatever as to the incomes, all of which she was to enjoy during her natural ⁶²⁰ life. As there was here no restraint on alienation beyond lives in being, the trust, as to her, did not contravene the statute. 2. A further trust was established, by which, at Mrs. Spencer's death, her children, and the issue of such children, were to enjoy the net incomes of the property until a certain period, when the fee was to vest in the survivors. As to this latter trust it is urged by respondent that the alienation was suspended beyond the legal period, and that this trust is not only void, but its invalidity taints the entire instrument, in consequence of which the whole trust must be held void, and that the property was subject to execution, on plaintiff's judgment against the grantor of the trust deed.

If it be true that the trust created by the deed is of such a nature as to make it indivisible, and incapable of being carried out as to that trust which is clearly legal, because of the alleged invalidity of the other trust, and if the other trust is in fact illegal, plaintiff's contention would be sound. But as we think the trusts are severable, it becomes immaterial whether or not the trust as to the children is valid. The children are not made parties; all the parties to the trust are living; the judgment here as to Mrs. Spencer's interest will not affect the rights of the children after her interest ceases. We need not, therefore, determine the children's rights in the event of Mrs. Spencer's death, should they or any of them outlive her.

In *Estate of Hendy*, 118 Cal. 656, 50 Pac. 753, the testator left a bequest of five thousand dollars to his niece, Mrs. Green, to be held in trust by his executors for her benefit, and the interest to be paid her monthly, and at her death "the same to be continued to her two children, Harrold and Mildred Green, until they are each twenty-five years of age, when the five thousand dollars shall be paid to them, share and share alike." Mrs.

Green petitioned to have the legacy distributed to her absolutely, on the assumption that the trust declared was void for undue suspension of the power of alienation: Civ. Code, sec. 715. It was held that the will did not create a single trust, but established: 1. A trust for the benefit of Mrs. Green; and 2. A trust for the benefit of her two children. And it was said: "Harrold and Mildred were in being at the creation of the trust, and are still living and in their minorities. Therefore, whatever conclusion may be reached as to the validity of the trust for the children, it is obvious that there can be no legal ⁰²¹ objection advanced against the trust to Mrs. Green. . . . It is manifest, therefore, that the decree awarding Mrs. Green five thousand dollars as an absolute legacy must be reversed, since the trust, as to her, being valid and distinct from that on behalf of the children, the utmost she would be entitled to receive in any event would be the income from the fund during her life. The future disposition of the principal of the fund would concern only the children and the residuary legatees." It is true that the court proceeded to show that the trust to the children also was valid, and it is hence urged by respondent that the case is not decisive of the present one. As we understand the decision, however, there was a clear and distinct expression of belief that the invalidity of the trust to the children would make no difference in the conclusion as to Mrs. Green's rights. And the court disposed of the other aspect of the case because the matter was in probate, and seemed to call for a settlement of the children's rights, and not because it had any necessary bearing on the trust as to Mrs. Green. We are unable to distinguish between that case and the present one, and, besides, we are satisfied, upon authority and upon reason, that the trust, as to Mrs. Spencer, should be upheld. Mr. Gray says, in his Rule against Perpetuities, section 341: "When the settlor or testator has himself separated the contingencies, there is no difficulty in regarding the gifts separately, and upholding one, although the other fails. And the courts naturally, and properly, lean to construing the gifts separately, when it can be done."

It was stated as the rule in *Harrison v. Harrison*, 36 N. Y. 543, that it is no objection that the limitations, as well those which are good as the one alleged to be bad, are embraced in a single trust. Such trust, created for two purposes—one lawful and the other unlawful—is good for the lawful purpose, though void as to the unlawful one.

Amory v. Lord, 9 N. Y. 403, was referred to and distinguished because in that case "the estate in the rents and profits, etc., devised for the benefit of the children, and the remainder in fee to the grandchildren, were so mixed up with, and dependent upon, the illegal and void one [the life estate in the surviving husband or wife], that it was impossible to sustain the one without giving effect to the other." That is precisely the distinction we find in the numerous cases on the subject where there is apparent conflict. If the several trusts are not so interdependent ⁶²² as that neither one can be dealt with without giving effect to all the others, the court will sort out the good from the bad, and give effect to the valid trusts.

It was said by the court in *Van Schuyver v. Mulford*, 59 N. Y. 426, 432, where previous similar cases were re-examined, that "if the estate was vested, under the will, in a trustee, upon several independent trusts, some of which are legal, while others are in contravention of the statute regulating uses and trusts or the statutes against perpetuities, the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trusts, and will only be void as to the illegal or invalid trusts."

The rule was thus expressed in *Tiers v. Tiers*, 98 N. Y. 568: "The rule is quite well settled that an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but will be cut off in the case of a trust which is not an entirety, as well as in the case of a limitation of a legal estate."

That this is the generally accepted rule we think there is no doubt. Looking at the deed before us, what seems to us to be intended as the primary trust is the trust for the benefit of Mrs. Spencer, and the ulterior contingent limitation is easily separable from the primary trust, and is but incidental, its purpose being to provide for a contingency which may never arise, since Mrs. Spencer may outlive all her children, and the failure of the provision as to them would not affect the trust as to her.

The judgment and order should be reversed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

Trusts Void in Part.—A will creating legal and illegal trusts may be permitted to stand so far as the legal trusts are concerned, if they can be separated from the illegal ones without doing injustice or defeating what the testator must be presumed to have wished: *Cross v. United States Trust Co.*, 131 N. Y. 830, 27 Am. St. Rep. 597, 30 N. E. 125. See, too, *Hascall v. King*, 162 N. Y. 134, 76 Am. St. Rep. 802, 56 N. E. 515. It is otherwise if they are so connected as to constitute an entire scheme: *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880. See the monographic note to *Johnston's Estate*, 64 Am. St. Rep. 634-646, on the severability of forbidden trusts.

BURNS v. CLARK.

[133 Cal. 634, 66 Pac. 12.]

PERSONAL PROPERTY—POCKET OF QUARTZ GOLD WITHOUT OWNER—FINDER'S RIGHT TO.—If a laborer, employed to dig and level off a grade on public land for a quartz-mill, but which is not within any mineral location, finds a pocket of quartz gold while so working at or close to the upper edge of the sloping rock left by the excavation, such gold, when extracted by him, belongs to him as first taker, under the laws of the United States, and he may recover it from his employers who have wrongfully seized and converted the same to their own use. (pp. 233, 235.)

MASTER AND SERVANT—POCKET OF QUARTZ GOLD FOUND IS NOT ACQUIRED "BY VIRTUE OF EMPLOYMENT," WHEN.—When a laborer, employed to dig and level off a grade on public land for a quartz-mill, but which is not within any mineral location, finds a pocket of quartz gold, while so working, and extracts it, such gold is not acquired "by virtue of his employment," because the employers were engaged in excavating, not to extract minerals, but for the purpose of establishing a mill site. (pp. 234, 236.)

J. C. Webster and E. W. Holland, for the appellant.

F. W. Street and Reinstein & Eisner, for the respondents.

625 SMITH, C. Appeal from a judgment for the defendants and from an order denying the plaintiff's motion for a new trial. The suit was brought for the conversion of certain gold and gold-bearing rock, of which, it is alleged in the complaint, the plaintiff was, on the day named, the "owner . . . and lawfully possessed," and which, it is alleged, the defendants "wrongfully and unlawfully, and against the will of [plaintiff], took and carried away," and "converted . . . to their own use."

The facts of the case as found by the court are, that the defendants, Schoenfeld, Adler, and James, who were the owners

of certain mines, employed the plaintiff as a laborer to assist in the grading of a millsite on the public lands, for the use of their mines, and that "plaintiff, while working for said defendants, . . . in digging and leveling off a grade for a quartz-mill, discovered and dug out of said grade a pocket of quartz gold of the value of about six hundred dollars; that the plaintiff and his collaborators gathered up said gold and gold-bearing quartz in a gold-pan, and took the same to the office, and delivered it to the defendant . . . Bleck [the superintendent], who took possession of said gold for his employers"; but there was no evidence to justify the finding that the plaintiff took the gold to Bleck, or that he delivered it to him. The evidence without contradiction, was to the effect that Clark (the overseer) took it from the defendant and delivered it to Bleck.

There is no finding as to the plaintiff's alleged possession of the gold at the date named in the complaint. All that is found is, that he "was not lawfully possessed of" it. Nor is there any finding as to the plaintiff's intention to appropriate the gold when he took possession of it, though the plaintiff testified explicitly that such was his intention. It must be ⁶³⁶ assumed, therefore, for the purposes of this decision, that the plaintiff, on discovery, reduced the gold to possession with intent to appropriate it to himself, and that it was taken from his possession by Clark, the agent of the defendants Schoenfeld & Co. Otherwise, assuming these points to be material, it would be necessary to order a new trial for lack of findings, or for insufficiency of the evidence to justify the finding as to the delivery of the gold to Bleck by the plaintiff.

Prima facie these facts being assumed, the plaintiff was entitled to recover. Mere occupancy of a thing, as against all except the state and the owner, is a sufficient title (Civ. Code, sec. 1006); and where things are found that have no owner, "they belong, as in a state of nature, to the first occupant or fortunate finder": 2 Blackstone's Commentaries, 402; 1 Blackstone's Commentaries, 295; 2 Kent's Commentaries, 356. And in the case of valuable mineral deposits, the title of the first taker is confirmed by express statutory grant: U. S. Rev. Stats., sec. 2319; *Forbes v. Gracey*, 94 U. S. 762. The title of the plaintiff must therefore prevail, unless, on the facts found, a better right is disclosed in the defendants; and whether or not this is the case is the question to be considered.

Such a right is claimed by the respondents on two grounds, namely: 1. On the alleged ownership of the land out of which

the gold was taken; and 2. That the gold was acquired by the plaintiff "by virtue of his employment."

1. With regard to the former ground, the contention is that the land on which the gold was found was in the actual occupancy of the defendants, and consequently, as against all the world except the government, their title was good by occupancy: Civ. Code, sec. 1006. This contention involves two propositions—one of fact and one of law—neither of which, we think, can be sustained.

With regard to the fact, it does not appear from the findings that the gold was discovered on land occupied by the defendants. The ground was public land of the United States, and the defendants had entered upon it for the purpose of grading a site for a quartz-mill. But there was no location of the land with a view of acquiring title under the laws of the United States (U. S. Rev. Stats., sec. 2337; 1 Lindley on Mines, sec. 519), or, it was stipulated, "location of any kind, and no monuments or marks to show its boundaries." The occupancy of the defendants, therefore, assuming it to be coextensive with ⁶³⁷ the intention with which they entered, cannot be regarded as extending beyond the level space graded for the site of the mill, and for use in connection therewith. But the gold was not found within the limits of this space; and if the finding of the court that it was "discovered and dug out of said grade" is to be thus construed, it has no support in the evidence. The gold was discovered at the northwest corner of the excavation made in the hill, and according to the evidence of all the witnesses, at or close to the upper edge of the sloping rock left by the excavation, and according to some of the witnesses, one or two feet beyond. There is no finding whether it was within or without the outer line of the actual excavation, or of the excavation intended, except the finding that it was "discovered and dug out of the grade." Nor, unless the term "grade" be limited to the level space graded for the site of the mill, can any very definite sense be assigned to this finding: Bouvier's Law Dictionary, word "Grade"; Little Rock v. Citizens' Street Ry. Co., 56 Ark. 32, 33, 19 S. W. 17.

But whether the gold was found within or without the outer line of the excavation, there is nothing in the findings or the evidence to show that the defendants intended to occupy any land beyond the foot of the excavation in the rock, or to appropriate any land beyond it, for any purpose; and with reference to the ground actually graded or leveled, or to be graded or leveled,

the appropriation was not with a view of acquiring title to the land, but for a particular purpose, which, in the absence of evidence or finding to the contrary, must be presumed to have been temporary. Such an occupation is entitled to protection against unlawful intrusion, but is insufficient to give title, real or presumptive, to the land. To constitute foundation of title, the occupancy must be with the intent or design to acquire the ownership of the thing occupied: *Bouvier's Law Dictionary*, word "Occupancy," and authorities cited.

Nor, were the contention of the defendants otherwise good, could any title to mineral lands be acquired by occupancy, except for the purpose of mining or extracting the minerals: U. S. Rev. Stats., sec. 2319; *McClintock v. Bryden*, 5 Cal. 97, 68 Am. Dec. 87, 91 et seq.; *Lindley on Mines*, secs. 216 et seq., 219. The entry of the defendants in this case was not for this purpose, but for the purpose ⁶²⁸ of establishing a millsite, which was permissible only on nonmineral land: U. S. Rev. Stats., sec. 2337; *Lindley on Mines*, sec. 519 et seq.

2. The remaining contention of the respondents is that the gold was acquired by the plaintiff "by virtue of his employment," and hence, under the provisions of section 1985 of the Civil Code, became the property of his employers, the defendants. But whatever be the meaning of the provision cited, there is no finding that the gold was so acquired. All that is found is, that "plaintiff, while working for said defendants, . . . in digging and leveling off a grade," etc., discovered the gold, etc. This is not a finding that the plaintiff discovered the gold in digging out and leveling off the grade, but that he found it while working for the defendants in that way. The expression is not unambiguous, but this seems to be the natural construction, and is more in accord with the facts as shown by the evidence, which were, that though the gold may have been discovered by the plaintiff while working for the defendants, it was dug out by him, not in the course of his work, but independently of it, and for the sole purpose of extracting the metal.

But were the finding more explicit, and did it appear that the gold was discovered and dug out in digging and leveling the grade, the result would not be different. The defendants were engaged in excavation, not for the minerals, but for the purpose of removing and throwing away the matter excavated—or, it may be said, the taking of the matter excavated was with the purpose of abandoning it. Had the object, or one of the objects, of the excavation been to obtain the gold, any gold

found by an employé would doubtless belong to his employers. But the gold found by the plaintiff was property without owner, or intending owner, and therefore subject to his right of appropriation by occupancy. The case is therefore the same in principle as that in *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172, where the property was found by the employé in the course of her employment, and in the similar cases of *Hamaker v. Blanchard*, 90 Pa. St. 377, 35 Am. Rep. 664, and *Durfee v. Jones*, 11 R. L. 588, 23 Am. Rep. 529.

It is not to be supposed that the intent of the provision in section 1985 of the Civil Code was to alter the established law⁶³⁹ in this respect. Rather it is to be construed as but an expression of the familiar principle that forbids an agent or trustee from using the trust property or powers conferred upon him for his own benefit, and which, in case of his doing so, requires him to account for the profits: *Wharton on Agency*, secs. 231, 236 et seq.; *Civ. Code*, secs. 2229, 2237; 1 *Story on Trustees*, secs. 321 et seq., 323. The term "virtue," as in the cognate expression, "virtute officii," is here used to denote merely the power or authority proceeding from the employment; and the expression, "by virtue of his employment," has no application to acquisitions not coming within its scope or purpose: *Winfield's Adjudged Words and Phrases*; 3 *Esp.* 541, note; *People v. Schuyler*, 4 N. Y. 187; *Seeley v. Birdsall*, 15 Johns. 267. Had the object of the grading been the acquisition of the ore to be extracted, the provision would, no doubt, apply; but the casual finding of gold by an employé in the course of an employment in no way related to such an object, though doubtless an acquisition made by reason or cause of the employment cannot with propriety be said to have been by virtue of it.

I advise that the judgment and order appealed from be reversed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Henshaw, J., McFarland, J., Temple, J.

Hearing in Bank denied.

If a Servant Finds Property in the course of his employment, it belongs to him, and not to his master: *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172; *Hamaker v. Blanchard*, 90 Pa. St. 377, 35 Am. Rep. 664. See, also, in this connection, *Durfee v. Jones*, 11 R. L. 588, 23 Am. Rep. 528; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100.

COPSEY v. SACRAMENTO BANK.

[133 Cal. 659, 66 Pac. 7, 204.]

TRUST DEEDS—TRUSTEES' SALE TO THEMSELVES—WHAT IS NOT.—If the debtor of a bank secures it by a trust deed given to trustees known to him to be directors and stockholders of the bank, such trustees are entitled to enforce the trust created by the deed; and if the debt is not satisfied when due, they may sell the property to the bank and give a valid deed thereto. The trustees are not the bank, and the sale is not one by trustees to themselves. (pp. 238, 240.)

MORTGAGEE'S SALE UNDER POWER—VALIDITY OF.—A mortgagee who is vested with the power to sell for breach of condition is a trustee as well as a creditor, and may purchase at his own sale, notwithstanding the general principle of equity which forbids trustees dealing with the trust property in any way looking toward their own private advancement. Such a sale cannot cut off the equity of redemption, and may be avoided by the mortgagor, but it is not void. As to all other persons, it is a valid sale and vests title in the trustee. (p. 239.)

TRUSTEES' SALE—BENEFICIARY AS BIDDER.—When a debtor of a bank secures it by a trust deed given to trustees with knowledge that they are directors and stockholders of the bank, and such trustees enforce the deed, for condition broken, by a sale of the property, the bank is entitled to bid at the sale because it, as such, occupies no fiduciary relation in the transaction. (p. 240.)

TRUST DEEDS—TRUSTEES' SALE—SETTING ASIDE.—If a debtor of a bank secures it by a trust deed, which is enforced for condition broken, by a sale of the property to the bank, no action can be maintained to set aside the sale and deed thereunder, on the ground that the trustees were directors and stockholders of the bank, where no injury is shown, and there is no offer to redeem. (p. 240.)

CORPORATIONS—CONTRACT OF DIRECTOR WITH—VALIDITY OF.—A director's contract with his corporation is voidable at the instance of his beneficiary, but it is not void. To avoid it, injury must be shown. (p. 240.)

J. F. Ramage, for the appellant.

Freeman & Bates, for the respondent.

660 GAROUTTE, J. Plaintiff was the owner of a tract of land, and as security for the payment of a debt owing to the Sacramento Bank she transferred the title thereof by deed of trust to Coleman and Hamilton, as trustees. Having failed to satisfy the debt when due, the trustees sold the property to the bank, and a deed to it followed. The present action is brought to set aside the sale, and cancel the deed, upon the ground that

the sale was void. A demurrer was sustained to the complaint, and the sufficiency of plaintiff's pleading in her allegations of fact is the question presented upon this appeal.

Equitable relief is sought upon the ground that Coleman and Hamilton, while acting as trustees of plaintiff, were stockholders and directors of the defendant, and that fact being true, they could not sell the property to the defendant. By this claim it is sought to invoke the broad principle of equity, that trustees are forbidden to purchase at their own sale. Indulging in presumptions against the pleader, it will be presumed that these trustees were stockholders and directors of defendant at the time the trust deed was given, and it will be further presumed that plaintiff, at the time of the creation of the trust, knew that fact. Under such a state of facts there can be no question but that Coleman and Hamilton were entitled to act as trustees of the trust created by the deed: *Cassady v. Wallace*, 102 Mo. 580, 15 S. W. 138; *Foster v. Latham*, 21 Ill. App. 165; *Darst v. Bates*, 95 Ill. 513; *Hamill v. Copeland*, 26 Colo. 181, 56 Pac. 901. In the case of *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342, it is conceded that the ⁶⁶¹ trustee to sell under a mortgage may be the mortgagee himself.

The reply brief declares: "The very foundation of appellant's right to the relief demanded is based upon the fact that her trustees sold the trust estate to a corporation in which they were financially interested." The general right of trustees to purchase at their own sales is well understood to be prohibited (*Broder v. Conklin*, 121 Cal. 282, 53 Pac. 699), but the class of cases illustrated by the one at bar may be said to be *sui generis* and exceptional. For, notwithstanding the general principle of equity which forbids trustees dealing with the trust property in any way looking toward their own private advancement, it is a well-settled principle of law that the mortgagee who is vested with the power to sell for breach of condition may purchase at his own sale. This principle is recognized in the early California case already cited, and in many other jurisdictions. All the decisions upon this state of facts go to the effect that the sale is not void, but voidable only by the mortgagor. As to all other persons, it is a valid sale, and vests title in the trustee. It is said in *Allen v. Ransom*, 44 Mo. 267, 100 Am. Dec. 282: "Admitting the relation between the parties, and that the plaintiff was the actual purchaser, is it true that the sale was void, and that the purchaser acquired no title? It is well settled that a mortgagee with power of sale is a trustee as well

as a creditor, and that at his own sale he cannot become a purchaser, either directly or indirectly, so as to cut off the equity of redemption. But such a sale is not void. It is good as to all the world, and for all purposes, excepting only that the mortgagor still has the right to pay the debt and redeem the land. Purchases by some classes of trustees at their own sales are sometimes treated as void, but never in sales of this kind. The subject was fully considered in *Thornton v. Irwin*, decided at last January term (43 Mo. 153), where we held that the mortgagor had a right to redeem notwithstanding the sale; but I know of no case in this or any other court where such sales are treated as a nullity."

In the foregoing class of cases it has been held that the mortgagor retained the right to redeem. In other words, the trustee being the purchaser, equity would not allow the beneficiary to suffer loss by the transaction, and would extend to ⁶⁶² the mortgagor the right of redemption, as the most direct and complete way of rendering unto him full justice. In those cases it is apparent from the general tenor of the decisions, that an action to set aside the sale, unaccompanied by an offer to redeem, would not state a cause of action which a court of equity would recognize. It seems, therefore, that in this exceptional class of cases the general principle of equity, as bearing upon the conduct of trustees in dealing with the trust property for their own benefit, has been relaxed. In a case presenting the facts found in this record it may be said that in order to support an action to set aside the sale, some injury to plaintiff must be averred. Upon the other hand, if it be conceded that an action to redeem could be maintained, then it is sufficient to say that plaintiff has not sought relief in that way.

Viewing this case from the other side, it cannot be said that the facts disclose a sale by trustees to themselves. Coleman and Hamilton, the trustees, though directors and stockholders of the defendant bank, were not the bank. Non constat but they, as directors, opposed the purchase of the property by the bank. The bank was essentially an entity acting for itself. It is difficult to see how the trustees could have refused to accept its bids if it had been the highest bidder. Their duty to the trustor would not have allowed them to do so. The bank, as such, occupied no fiduciary relation in the transaction, and therefore, clearly, was entitled to bid at the sale; and being the highest bidder, it would seem that a decree in equity would issue against the trustees to compel the execution to it of a deed.

Again, it is well settled that a director may deal with his corporation; he may advance it money by way of loan, or even sell it property: *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516. Such contracts are voidable at the instance of the beneficiary, but are not void; and, in order to avoid them, injury must be shown. Many cases are cited to this point in *Smith v. Ferries etc. Ry. Co.*, 51 Pac. 717. *Kitchen v. St. Louis etc. Ry. Co.*, 69 Mo. 224, contains an exhaustive review of the law bearing upon facts largely similar in principle to those of the case at bar.

These trustees of plaintiff, being directors of the corporation, ⁶⁶³ were trustees of the stockholders of the corporation, and it would therefore necessarily follow that if this action may be maintained, and the relief here sought adjudged, then any stockholder of the corporation, for the same reason, could maintain a similar action and secure the same relief. But it is almost self-evident that a stockholder of the defendant bank could not secure the relief here sought, upon the ground that the trustees, being directors of the bank, were his trustees, unless he first showed that he was damaged by the purchase.

Judgment affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

A Director of a Corporation May Deal With It, loan it money, and take security therefor: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Schufeldt v. Smith*, 131 Mo. 280, 52 Am. St. Rep. 628, 31 S. W. 1039; *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206. Contracts made by a corporation with its officers are not void per se, though they will be closely scrutinized: *Singer v. Salt Lake etc. Co.*, 17 Utah, 143, 70 Am. St. Rep. 773, 53 Pac. 1024.

A Purchase of Property by a Trustee of the Cestui Que Trust is not void, but voidable: *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 289.

A Purchase by a Mortgagee of the Mortgaged Property at a sale under a power contained in the mortgage is not void, but merely voidable at the election of the mortgagor or his successor to redeem at any time before final judgment of eviction. The purchase is good for all purposes, except that it does not bar the mortgagor's equity of redemption: *Palmer v. Young*, 96 Ga. 246, 51 Am. St. Rep. 136, 22 S. E. 928; *Mutual Loan etc. Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980; *McCall v. Mash*, 89 Ala. 489, 18 Am. St. Rep. 145, 7 South. 770; *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282.

Trustee's Sale.—If a note given to a bank is secured by a trust deed, which is enforced by a sale of the property to the bank, the sale is not void because the trustees who conducted it were directors and stockholders of the bank, or because the bank was the purchaser: *Sacramento Bank v. Copsey*, 133 Cal. 663, post, p. 242, 66 Pac. 8, 205.

SACRAMENTO BANK v. COPSEY.

[133 Cal. 663, 66 Pac. 8, 205.]

TRUSTEES' SALE—DEFICIENCY—ACTION FOR BALANCE.—When a promissory note is secured by a trust deed, and a deficiency exists after a sale for condition broken, the payee may, by an action at law, enforce payment of such deficiency. (p. 243.)

TRUSTEES' SALE—WHEN NOT VOID.—If a promissory note given to a bank is secured by a trust deed, which is enforced, after condition broken, by a sale of the property to the bank, the sale is not void because the trustees who conducted the sale were directors and stockholders of the bank, or because the bank was the purchaser. (p. 243.)

OPTION TO RENEW A NOTE WHEN NOT SELF-EXECUTORY.—THOUGH A PROMISSORY NOTE declares that if "not paid at maturity, it is hereby continued from year to year at the option of the holder until paid," it is enforceable by him at any time after maturity when it does not appear that he elected to exercise his option to renew it. Therefore, if secured by a trust deed, the trustees may proceed to sell as provided therein. (p. 244.)

Freeman & Bates, for the appellant.

J. F. Ramage and J. B. Hall, for the respondents.

664 GAROUTTE, J. Defendants executed a trust deed for the purpose of securing the payment of a promissory note in favor of plaintiff. The trustees, after breach in the condition of the deed, sold the land, and credited the amount received from the sale upon the note, less the costs of the sale. Plaintiff then brought the present action to recover the balance due upon the note. Judgment went against it, and this appeal is prosecuted therefrom.

As indicated by an opinion found in appellant's brief, the trial court seemed to hold that plaintiff must look alone to the land described in the trust deed for the satisfaction of its note, and this position is now maintained by respondents' counsel. No case is cited to support this proposition of law other than *Koch v. Briggs*, 14 Cal. 261, 73 Am. Dec. 651, and that case fails to

do so. The question was not there involved, and the language relied upon does not go to the lengths here claimed. Upon the contrary, it seems that both upon principle and authority the law is the other way. Indeed, the case of *Howard v. Ames*, 3 Met. 311, cited by respondents as to another proposition, is directly opposed to their claims in this regard. It is there said: "The specific property in such case is appropriated to the payment of the specific debt, so that the money to be realized from the sale would operate, ipso facto, as payment of the debt, without any further act or agreement of the parties. If, then, an action is brought against the debtor for the balance of that specific debt, it seems to us that it is a good answer to show that if the pledged property had been fairly managed and properly sold, it would have been sufficient to pay the whole debt, and that there would have been no balance due." In *Mallory v. Kessier*, 18 Utah, 11, 72 Am. St. Rep. 765, 54 Pac. 892, the court says: "The balance or deficiency, after it has been properly ascertained, whether by sale under a power or by foreclosure in equity, constitutes a subsisting indebtedness, ⁶⁶⁵ as well as did the original debt. We are therefore of opinion that in a case like the one at bar the amount realized by sale under the power may properly be treated as a payment on the note, and that the creditor may, by an action at law, enforce payment of the balance remaining unpaid and unsecured."

Upon principle, it may be said that a person having exhausted his remedy under the trust deed, and a balance still remaining unpaid upon the note, is entitled to bring a direct action for the recovery of that balance. It is unnecessary for the purposes of this case to decide whether or not the remedies by suit upon the note and by sale of the property are concurrent; for here the sale was first made and the amount received paid upon the note. If respondents' position be sound, it might equally as well be claimed that a sale under foreclosure would satisfy the note secured, regardless of the amount brought at the sale. The promissory note in this case was an express contract to pay plaintiff a certain sum of money, and its terms can only be satisfied by the payment of that amount. There is no covenant in the deed that a sale of the land under its provisions shall constitute a satisfaction of the debt. And it certainly would be an unauthorized construction of the instrument to hold that, by its terms, if the land at the sale brought more than the amount of the note and costs, then the residue should be returned to the original owner, but if it brought less than that

amount, still the note would be satisfied in full. Upon this branch of the case we conclude that if a sale of the land results in a failure to produce a sufficient sum to satisfy the note and costs, then a balance thereon still remains due and unpaid, which the creditor is entitled to recover in an action brought upon the note.

It is next claimed by respondents that the trustees conducting the sale being stockholders and directors of the bank, the creditor, the bank being the purchaser at the sale, that for these reasons the sale was void. The question thus raised has been squarely met and decided against respondents' contention in another branch of this same litigation: *Copsey v. Sacramento Bank*, 133 Cal. 659, ante, p. 238, 66 Pac. 7, 204.

It is next claimed that the sale by the trustees was void by reason of its being prematurely had, and also by reason of a defective notice thereof. In this regard it is contended that ~~the~~ the note was not due when the sale was had, and the following provision thereof is relied upon to sustain this contention: "If this note is not paid at maturity, it is hereby renewed from year to year, at the option of the holder, until paid, and during such year the makers shall not have the right to pay the same." The note was dated November 6, 1894, and payable one year after date. The sale was had November 22, 1897. If the sale could not be had upon November 22d, by reason of this provision in the note, it never could be had; for if the note was not due and payable at that time, it never would become due and payable. The provision of the note above quoted is unique, and in every way favorable to the bank alone. At the same time a reasonable construction must be given it, and the one just suggested would be most unreasonable. When plaintiff, by the trustees, proceeded to advertise the property for sale under the trust deed, its action was a declaration that it treated the note as due. By the provision quoted plaintiff had the option to consider the note renewed from year to year, and if it did not so consider it renewed, it could, at any time after the expiration of the first year, insist upon a sale. The clause in the above-quoted provision which denied to defendants the right to pay the note during the year when plaintiff considered it renewed has no force here, for, clearly, plaintiff, by its act in insisting upon a sale, showed that it did not exercise the option given it, of considering the note renewed for another year. The note not being renewed at the time of the sale, it was due and payable, and defendants had the right to pay it at

that time. The notice of sale in all substantial matters fully complied with the law.

For the foregoing reasons the judgment is reversed and the cause remanded.

Van Dyke, J., and Harrison, J., concurred.

On September 12, 1901, the following opinion was rendered upon petition for rehearing:

THE COURT. By petition for rehearing, defendants have vigorously attacked the soundness of the construction given by the court to the provisions of the promissory note here involved, wherein it was concluded that the note was due when the sale of the premises took place. Whether or not that construction ~~be~~ be the true one seems to be wholly immaterial. For, clearly, the interest provided for by the note was due and owing at the time the sale was had, and under the contract a sale could be made to satisfy the interest.

Hearing in Bank denied.

If Property is Sold Under a Power in a Trust Deed, the amount realized may be treated as a payment of the note, and the holder may maintain an action to enforce payment of the balance remaining unpaid and unsecured: *Mallory v. Kessler*, 18 Utah, 11, 72 Am. St. Rep. 765, 54 Pac. 892.

Trustee's Sale.—When a debtor of a bank secures it by a trust deed given to trustees with knowledge that they are directors and stockholders of the bank, and such trustees enforce the deed by a sale of the property, the bank may bid at the sale, and no action can be maintained to set aside the sale to the bank on the ground that the trustees were directors and stockholders, where no injury is shown and there is no offer to redeem: *Copsey v. Sacramento Bank*, 133 Cal. 659, ante, p. 238, 66 Pac. 7, 204.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MERRITT v. BOYDEN & SON.

[191 Ill. 136, 60 N. E. 907.]

FORGERY.—ALTERING, BY RAISING THE AMOUNT of a promissory note, is forgery. (p. 247.)

PROMISSORY NOTES.—IF THE AMOUNT OF A PROMISSORY NOTE IS CHANGED MATERIALLY, either by a payee or transferee, it is vitiated and destroyed in the hands of the party responsible for the alteration. (p. 248.)

PROMISSORY NOTES—BONA FIDE HOLDER.—THE EFFECT OF THE ALTERATION of a promissory note by raising the amount thereof is to make it void even as against a subsequent bona fide indorsee without notice. (p. 248.)

PROMISSORY NOTES—BLANKS—IMPLIED AUTHORITY.—Where a note for ——— hundred dollars is executed to a third party to be negotiated, the maker so far constitutes the former his agent as to be bound to an innocent purchaser of the note by the act of the agent in filling in such blanks. (p. 252.)

PROMISSORY NOTES—NEGLIGENCE IN EXECUTING.—A note carelessly executed, leaving room for altering the amount by insertion without defacing the instrument or exciting suspicion of a careful man, binds the maker to any "bona fide" holder without notice, for any amount to which, by reason of the opportunity thus afforded, it is subsequently increased. (p. 250.)

PROMISSORY NOTE—BONA FIDE HOLDER.—EVEN GROSS NEGLIGENCE on the part of the purchaser of a note is insufficient to deprive him of the character of a "bona fide" holder. (p. 254.)

PROMISSORY NOTES.—MARGINAL FIGURES are not a part of the note, but merely a memorandum of the amount, and their alteration, in the absence of notice of fraud, is immaterial. (p. 256.)

APPEAL—PRESUMPTION.—On the admission of a note in evidence by the lower court, the presumption is that there

were no alterations in it requiring explanation, and in the absence of the original note it cannot be determined by the superior court whether or not such admission was an error. (p. 257.)

JURY TRIAL—PROVINCE OF THE COURT.—IMPLIED KNOWLEDGE AND AUTHORITY are questions of law, and ought not to be left to jury to determine. (p. 258.)

EVIDENCE OF THE ALTERATION OF OTHER NOTES of same party is rightly refused where it is not claimed that the holder of an altered note ever held or was aware of any such other notes. (p. 258.)

Action by Boyden & Son against Silverman and Merritt on a note purporting to be executed by them, promising to pay to themselves, or order, thirteen hundred dollars, and by them indorsed in blank. Merritt alone defended, pleading that the note was signed by him without consideration, for the accommodation of Silverman and as his surety, and that after its execution it was fraudulently altered, as shown in the opinion of the court. The judgment of the trial court was in favor of the plaintiffs. The defendant Merritt appealed to the appellate court, which, having entered a judgment of affirmance, he appealed therefrom to the supreme court.

N. F. Anderson, E. C. Graves, and Wilson & Moore, for the appellant.

Blish & Lawson and A. P. Miller, for the appellees.

¹⁴¹ **MAGRUDER, J.** When the note, sued upon in this case, was signed and indorsed by the appellant, Merritt, and L. Silverman, Silverman took the note, and, through his action or that of others acting for him, the note was sold and delivered to the appellees, Boyden & Son. The proof tends to show—and such proof is substantially undisputed—that the appellees purchased the note in good faith without notice of any defect in it, and paid therefor the sum of thirteen hundred dollars.

The defense made by the appellant in the trial court was based upon two theories: 1. That the words "one hundred" were written in the body of the note before the word "dollars," and that the word "one" was in some way erased, or taken out of the note, and the word "thirteen" was written in its place before the word "hundred"; 2. That, when the note was signed and indorsed by the appellant, the word "one" was not in the body of the note, but that there was a blank space before the word "hundred," and that, in this blank space and before the word "hundred," the word "thirteen" was written. Whether the note was altered in the one or the other of the modes thus

stated, the proof tends to show, and is substantially undisputed, that the change was not made by the appellant, Merritt, or by anyone authorized by him to make it, and that he knew nothing about the change, and had no intimation of it, until about the time the note fell due.

1. If the note was altered by the erasure of the word "one" in the body of it and the insertion of the word "thirteen" in the place of the word "one" before the word "hundred," then the alteration amounted to a forgery, and appellant is not liable upon the note, even though ¹⁴² the appellees were bona fide purchasers thereof for value without notice or knowledge of the change. If the amount named in a note is raised by erasing what is written, such alteration is a material one, and the note is thereby vitiated, so as to become void. When a note is changed materially, either by payee or transferee, not only is it vitiated and destroyed in the hands of the party responsible for the alteration, but no recovery can be had upon it against the maker by a person into whose hands it has come after the change was made, even though the latter be a bona fide indorsee for value without notice of the alteration: 2 Am. & Eng. Ency. of Law, 2d ed., 193, 255, 257; 3. Randolph on Commercial Paper, 2d ed., sec. 1754. Where a note is complete at the time when it is signed by the maker, its subsequent alteration by raising the amount thereof through obliteration of the same by the use of any chemical process, or other ingenious device, without the knowledge or consent of the maker, will discharge him from liability upon the note: *Burrows v. Klunk*, 70 Md. 460, 14 Am. St. Rep. 371, 17 Atl. 378. "When a negotiable instrument is materially altered, no recovery can be had thereon against anyone, who became a party thereto prior to the alteration, by any person into whose hands it has come since the alteration, even though he be a bona fide holder without notice": 4 Am. & Eng. Ency. of Law, 2d ed., 332; *Angle v. Northwestern Mut. Life Ins. Co.*, 92 U. S. 340. In *Burwell v. Orr*, 84 Ill. 465, we said: "The alteration of the instrument, on which the suit was brought, was material, and, under the circumstances, must be presumed to have been made by, or with the consent of, the holder. If so, the whole instrument, by the alteration, became ipso facto void. No subsequent indorsement, even to a bona fide purchaser for value, could give validity to a void instrument": *Pahlman v. Taylor*, 75 Ill. 629. The rule seems to be well settled that, in case of a material alteration of a note, it becomes invalid, even in the hands of a subsequent

indorsee for value: ¹⁴² Wade v. Withington, 1 Allen, 561; Commonwealth v. Emigrant Industrial Sav. Bank, 98 Mass. 17, 93 Am. Dec. 126.

The trial court, in instructing the jury upon the trial below, announced the law in regard to the effect of a material alteration, as it is above stated. On behalf of the appellant the court gave to the jury the following instruction, numbered 6:

"You are further instructed that, if you believe from the evidence in the case that, when the note sued on was originally made, it contained the words 'one hundred' written in the blank in the body of the note before the printed word 'dollars,' and that, after it was signed and indorsed by Silverman and the defendant, Merritt, it was altered without the knowledge, authority, or consent of said Merritt, by erasing the word 'one,' and writing in the word 'thirteen' where the word 'one' originally was, then you will find the issues for the defendant."

The judgment of the circuit court in behalf of the plaintiffs below, appellees here, and the affirmance of that judgment by the appellate court, are conclusive as to the facts, so far as this court is concerned. The courts below have found that the note was not altered by erasing the word "one" and writing in its place the word "thirteen."

2. The second theory of the defense made by the appellant in the court below was that, when he signed and indorsed the note, there was a blank space before the word "hundred," and that this blank space was subsequently filled by inserting the word "thirteen" therein without the knowledge or consent of the appellant. The testimony of the appellant is quite positive to the effect that he signed a note for only one hundred dollars, but his testimony leaves it doubtful whether, when he signed the note, the words "one hundred" were written in the body of the note, or whether only the word "hundred" was written therein without the word "one" before it and with a blank space before the word "hundred." Appellant at one time ¹⁴⁴ stated "that the note was written either 'hundred' or 'one hundred,' I didn't know which."

Upon the theory that, when the note was signed and indorsed by appellant, the word "hundred" was written in the body of it, but that the word "one" was not written before the word "hundred," and that a blank space was at that time before the word "hundred," which blank space was subsequently filled without the authority or knowledge of the appellant, the liability of the appellant must be determined by the application of principles

of law entirely different from those which have already been stated.

As bearing upon the second theory of the defense as thus announced, the court below gave to the jury, upon behalf of the appellees, the following instruction, numbered 1:

"The jury are instructed that, if you believe from the evidence that the note in question was signed and indorsed by the defendant, H. Clay Merritt, and one Silverman, and delivered by Merritt to Silverman to negotiate, and that, at the time said note was so signed and delivered to said Silverman, only the word 'hundred' was written therein, and that a space was left blank before the word 'hundred' sufficient to write therein the word 'thirteen,' and that said Silverman wrote, or caused to be written, in said blank space the word 'thirteen,' so that the body of said note read 'thirteen hundred dollars,' and then sold or caused to be sold the same to the said plaintiffs, and that said plaintiffs purchased said note in the due course of business before maturity for value in good faith and without notice of such change, then the defendant, H. Clay Merritt, is liable in this case for the face of said note and interest thereon, and you should so find by your verdict."

Appellant contends that the note was only a note for one hundred dollars, whether the word "one" was written in the body of it before the word "hundred," or whether there was a ¹⁴⁵ blank space before the word "hundred." We are unable to concur in this view. If there was a blank space before the word "hundred," it was not necessarily a note for just one hundred dollars, but the amount of the note was left blank. In other words, the note was not a complete note, as it would have been if the word "one" had been inserted before the word "hundred" when it was signed. Where the maker of a note delivers it to a third person to be negotiated, and such note, as an undertaking on the part of the maker, is not finished, but is to be afterward completed, the maker so far makes the person to whom he so delivers the note his agent, as to be bound by the acts of the latter to an innocent purchaser of the note. When the maker of a note has himself, by careless execution of the instrument, left room for an alteration to be made by insertion without defacing the instrument, or exciting the suspicion of a careful man, and the instrument, by reason of the opportunity thus afforded, is subsequently filled up with a larger amount than that which it bore at the time it was signed, the maker will be liable upon it, as altered, to any bona fide holder without notice. In

the hands of such a holder a negotiable instrument may be enforced, if a sum in excess of what was authorized by the maker is inserted in a blank left for the amount of the instrument: 4 Am. & Eng. Ency. of Law, 2d ed., 337; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *Fordyce v. Kosminski*, 49 Ark. 42, 4 Am. St. Rep. 18, 3 S. W. 892. In *Angle v. Northwestern Mut. Life Ins. Co.*, 92 U. S. 340, the supreme court of the United States said: "Negotiable instruments are frequently delivered for use, with blanks not filled; and, in respect to such instruments, it is held that, where a party to such an instrument intrusts it to the custody of another for use, with blanks not filled up, whether it be to accommodate the person to whom it was intrusted or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the ¹⁴⁶ rule is that, as between such party and innocent third parties, the person to whom the instrument was so intrusted must be deemed the agent of the party who committed the instrument to his custody, in filling the blanks necessary to perfect the instrument. . . . Where blanks exist in negotiable securities, delivered to another for use, the custody of the paper, under such circumstances, gives the custodian the right to fill the blanks." In *Young v. Ward*, 21 Ill. 223, this court said: "It is the settled doctrine, that if a party signs his name to a blank paper, and delivers it with authority to fill the blank above his signature with a note or bill for a particular amount, or to a specified person, and the person receiving it fills it for a larger amount, or to a different person, and it is passed in the course of business, without notice of the facts, the maker is bound by the instrument": 2 Daniel on Negotiable Instruments, 4th ed., sec. 1405.

In such cases the liability of the maker is placed by some authorities upon the ground of implied authority; that is to say, upon the ground that the maker of the note, by leaving the blank therein, impliedly authorizes the persons to whom he delivers it to fill the blank: 4 Am. & Eng. Ency. of Law, 2d ed., 337, and cases cited in notes; *Market etc. Nat. Bank v. Sargeant*, 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192; *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 198, 25 Am. Rep. 67.

By other decisions the liability of the maker of negotiable instruments with blanks improperly filled is placed upon the ground of negligence on the part of the maker in executing the

note with unfilled blanks in it: *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Harvey v. Smith*, 55 Ill. 224; *Anderson v. Warne*, 71 Ill. 20, 22 Am. Rep. 83; *Seibel v. Vaughan*, 69 Ill. 257; *Weidman v. Symes*, 120 Mich. 657, 77 Am. St. Rep. 603, 79 N. W. 894.

In the case at bar the evidence tends to show that the note in question was signed by the appellant with a blank space before the word "hundred." When he had ¹⁴² signed and indorsed the note, he delivered it to Silverman, his joint maker, for the purpose of having it negotiated, or knowing that Silverman intended to negotiate it. Under the circumstances, and in view of the authorities referred to, the appellant was liable to the appellees as bona fide purchasers of the note without notice of any defect in it, whether such liability rests upon the ground of implied authority to Silverman to fill the blank space, or upon negligence on the part of the appellant in leaving the blank space unfilled. By his conduct he either made Silverman his agent with implied authority to fill the blank, or he was guilty of such negligence in leaving the blank unfilled that an improper and unauthorized filling of it by Silverman cannot be set up as a defense against the appellees, who purchased the note in good faith without notice: *Johnson Harvester Co. v. McLean*, 57 Wis. 264, 46 Am. Rep. 39, 15 N. W. 177.

The question here is not exactly the same question as that which arose in the case of *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120. In the latter case, the note in controversy was originally made for three hundred dollars, and was altered after execution and delivery from three hundred dollars to three hundred and twenty dollars without the authority, knowledge or consent of the maker; there, as we understand the facts, the note, as originally drawn, contained the words "three hundred dollars," and a blank space, which had been left between the words "hundred" and "dollars," was filled by adding the words "and twenty" before the word "dollars," thus making the note a note for three hundred and twenty dollars. In *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120, the note was a complete note for three hundred dollars. In the case at bar, however, the note signed by the appellant was not a complete note, but was a blank note for "—— hundred dollars," and was made complete by inserting the word "thirteen" before the word "hundred." If the note in the present case had contained the words "one hundred dollars," and the words "and twenty" had been added before the word "dollars," so as to make it "one hundred

and twenty ¹⁴⁸ dollars," this case would be on all fours with the case of *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120.

Counsel for appellant refer to a large number of cases, which hold as follows: "It has now, however, become the established rule that, if the instrument was complete without blanks at the time of the delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention, although it may be negligently, will constitute a material alteration and operate to discharge the maker": 1 *Randolph on Commercial Paper*, 2d ed., sec. 187; *Angle v. Northwestern Mut. Life Ins. Co.*, 92 U. S. 331; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Burrows v. Klunk*, 70 Md. 460, 14 Am. St. Rep. 371, 17 Atl. 378; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 33 Am. Rep. 129, 1 N. W. 491; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661. An examination of the facts in the cases last referred to will show that, in each of the cases, the instrument, which was altered, was complete at the time of its delivery. The leading case is that of *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67, the opinion in which was delivered by Mr. Justice Gray, now of the supreme court of the United States, then chief justice of the supreme court of Massachusetts. In the *Stowell* case all the decisions upon this subject then extant are reviewed, and the cases are distinguished. There the note, as originally drawn, was a note for sixty-seven dollars, and was altered by inserting the words "four hundred and" in a blank space left before the words "sixty-seven" in the body of the note, and by inserting the figure "4" between the dollar mark and the figures "67" at the top of the note, thus changing a note for sixty-seven dollars into a note for four hundred and sixty-seven dollars. It will be observed that there the note, before it was altered, was a complete note for sixty-seven dollars. There can be no question that the *Stowell* case, and the other cases above referred to which follow the *Stowell* case, are diametrically opposed to the cases of *Harvey v. Smith*, 55 Ill. 224, and *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120, above referred to. The latter cases follow and are based upon *Young v. Grote*, ¹⁴⁹ 4 Bing. 253, the authority of which the *Stowell* case and the other cases following it regard as having been weakened and shaken by subsequent decisions both of the English and of the American courts.

It is not necessary, however, for us here to discuss the comparative merits of the view taken by this court in *Yocum v.*

Smith, 63 Ill. 421, 14 Am. Rep. 120, and Harvey v. Smith, 55 Ill. 224, and the view taken by the cases opposed to them in view of the fact that, in the case at bar, the note was not a complete note as to the amount mentioned in it, as were the notes in Harvey v. Smith, 55 Ill. 224, and Yocum v. Smith, 63 Ill. 321, 14 Am. Rep. 120, and in Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67, and the other cases above referred to.

We are of the opinion that the court below committed no error in giving to the jury instruction numbered 1, which was given in behalf of the appellees.

3. The appellant asked, and the court refused to give, twenty-five instructions, numbered from 17 to 42, inclusive. It is claimed by the appellant that the court erred in refusing to give these instructions. It is impossible for us, within the limits of this opinion, to examine each one of these instructions separately, and to comment upon the particulars in which they are claimed to be correct statements of the law. Their refusal constitutes no such error as would justify us in reversing this judgment. Without considering each instruction separately, it is sufficient to group them under certain general heads, and note their general characteristics.

Some of the instructions announce the same principle which is embodied in appellant's instruction numbered 6 above quoted. The refusal of these instructions did no injury to the appellant for the reason that the substance of them was given in said instruction numbered 6.

Some of the instructions are based upon the theory that mere negligence, or a want of proper diligence, is sufficient to deprive the purchaser of a promissory note of the character of a bona fide holder thereof. It is claimed ¹⁵⁰ on the part of the appellant that there was sufficient upon the face of the note here sued upon to put the appellees, as purchasers thereof, upon inquiry as to the real facts in regard to the execution of the note. There was certainly nothing in the body of the note to excite the suspicion of the holder. While there is some testimony given by experts to the effect that the word "hundred" was written before the word "thirteen" was written, still there seems to have been room enough to insert the word "thirteen" before the word "hundred" without exciting any suspicion in the mind of a party proposing to purchase the note that both words had not been written at the same time. Nor does it appear that there was anything in the figures "\$1300.00," placed in the upper left-hand

corner of the note, which would create in the mind of a proposed purchaser the obligation to make inquiry. The only peculiarity about the figures, which counsel for appellant referred to in his offer of proof, was that the two figures "13" were larger than the two ciphers in "\$1300.00," and that the ciphers placed after the figures "1300" to indicate that there were no cents, to wit, "\$1300.00," were smaller than the ciphers in the main body of "\$1300." We are not prepared to say that the difference in the size of the figures was such an indication of a defect in the note as to arouse the suspicion of a cautious man. However this may be, it is the doctrine of this court that mere negligence, however gross, is not sufficient to deprive a party of the character of a bona fide holder, but that there must be proof of bad faith on the part of the holder, in order to affect him with notice or knowledge of defects in the note purchased by him.

In *Comstock v. Hannah*, 76 Ill. 530, we indorsed the following proposition (page 535): "The party who takes it (commercial paper) before due, for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against the world. Suspicion of defect of title, or the knowledge of circumstances ¹⁵¹ which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part. . . . The duty of active inquiry does not rest on the purchaser of commercial paper to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." Again, in *Shreeves v. Allen*, 79 Ill. 553, we held: "Where a person takes an assignment of a promissory note before due, for a valuable consideration, and is not guilty of bad faith, even though he may be guilty of gross negligence, he will hold it by a title valid against the world, and it will not, in his hands, be subject to the defense of failure of consideration; that mere negligence on the part of an assignee of negotiable paper is not sufficient to deprive him of the character of a bona fide holder, and that proof of bad faith alone will deprive him of that character." The same doctrine was affirmed in *Matson v. Alley*, 141 Ill. 284, 31 N. E. 419: See, also, *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Goodman v. Simonds*, 20 How. 343; *McGrath v. Clark*, 56 N. Y. 36, 15 Am. Rep. 372.

The instructions now under consideration were properly refused, because they ignore the rule thus laid down, which requires actual knowledge of an alleged defect, or bad faith on the part of a holder of a note, to deprive him of the character of a bona fide purchaser.

Some of the instructions asked by appellant and refused assume that the note in question was a complete note, even though there was a blank, and not the word "one" before the word "hundred" when the note was signed. They assumed that a note for "—— hundred dollars" is the same as a note for "one hundred dollars." As the opposite view of this question is taken in the remarks above made, we regard these instructions as having been properly refused.

¹⁵² Some of the instructions were properly refused, because they were based upon the theory that the marginal figures, placed above and outside the body of a note, are a part of the note itself, so that their alteration will necessarily deprive the purchaser of the note of the character of a bona fide holder. Such is not the law. It is true that, under certain circumstances, marginal figures may be used to remove doubt or ambiguity in an instrument. "The marginal figures have been held to be no part of the instrument, but to be intended merely as a convenient index, and as an aid to remove ambiguity or doubt in the instrument itself": 4 Am. & Eng. Ency. of Law, 2d ed., 130; *Norwich Bank v. Hyde*, 13 Conn. 279; *Riley v. Dickens*, 19 Ill. 29; *Corgan v. Frew*, 39 Ill. 31, 89 Am. Dec. 286. Marginal figures are really not a part of the instrument, but merely a memorandum of the amount: 1 Daniel on Negotiable Instruments, 4th ed., sec. 86. An alteration or erasure of the marginal figures is an immaterial alteration, and will not affect the rights of the holder of the instrument: 2 Daniel on Negotiable Instruments, 4th ed., sec. 1499a. It has been held that, where the amount is left blank, and the marginal figures are altered to a larger sum, and the blank is filled to correspond, the acceptor of the blank bill is liable to a holder without notice: *Garrard v. Lewis*, 10 Q. B. Div. 30; *Johnson Harvester Co. v. McLean*, 57 Wis. 264, 46 Am. Rep. 39, 15 N. W. 177. In *Garrard v. Lewis*, 10 Q. B. Div. 30, it was said: "No alteration (even if it be fraudulent and unauthorized) of the marginal figure vitiates the bill as a bill for the full amount inserted in the body, when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered." It was there further said: "If the holder, in the absence of notice, would have

a right to neglect the marginal figure if it remained unaltered, and to look only to the body of the bill, it would seem to follow that, even if the marginal figure was altered, the holder would have a right, in the absence of notice, to assume it was altered properly. The holder's ¹⁵³ right to look to the body of the bill would not be affected by such alteration if he did not know the alteration was improper. A fortiori, his right to look to the body of the bill would remain the same when he did not know that the marginal figure had undergone any alteration at all."

In *Johnson Harvester Co. v. McLean*, 57 Wis. 264, 46 Am. Rep. 39, 15 N. W. 177, it was contended that the note was vitiated, because there was an alteration of the figures in the margin of the note which was unauthorized, and, in answer to this, the court said "that the figures were not a part of the note; and further, that if the alteration of the figures was made, such alteration was not known to the parties receiving the note, and there was nothing on the face of the note which would indicate that such alteration had been made."

In *Schryver v. Hawkes*, 22 Ohio St. 308, it was held "that the marginal figures were no part of the note, and an alteration of them and the filling up of the blank for a higher amount would not invalidate the instrument as to a surety. This is certainly the rule where the alteration is made possible by the maker's negligence—e. g., where the amount was left blank except a marginal memorandum of 'five hundred dollars,' and this was altered to five thousand dollars, and the blank filled for that amount, the maker was held liable to a bona fide holder for such increase of the amount": *Woolfolk v. Bank of America*, 10 Bush, 504; *Randolph on Commercial Paper*, 2d ed., sec. 187, note 158.

In *Smith v. Smith*, 1 R. I. 398, 35 Am. Dec. 652, the court said: "We do not think the marginal notation constitutes any part of the bill. It is simply a memorandum or abridgment of the contents of the bill for the convenience of reference. The contract is perfect without it. If this is so, any alteration in the figures cannot avoid the contract, because it is no alteration either material or immaterial in the contract": *Hollen v. Davis*, 59 Iowa, 444, 44 Am. Rep. 688, 13 N. W. 413; *Commonwealth v. Emigrant Industrial Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126; *Garrard v. Haddan*, 67 Pa. St. 82, 5 Am. Rep. 412; *Horton v. Horton*, 71 Iowa, 448, 32 N. W. 452. As the record in the case at bar is presented ¹⁵⁴ to us, there is no evidence that any alteration in the figures, if the same was material, was

known to these appellees when they purchased the note; nor does it appear that there was anything on the face of the note which would indicate that any alteration had been made.

Some of the instructions were erroneous, as leaving it to the jury to determine from an inspection of the face of the note whether there had been any alteration in the marginal figures upon the same. In *Goodman v. Simonds*, 20 How. 343, the supreme court of the United States said: "Where the supposed defect or infirmity in the title of the instrument appears on its face, at the time of its transfer, the question whether a party who took it had notice or not is, in general, a question of construction, and must be determined by the court as matter of law": *Riley v. Dickens*, 19 Ill. 29; *Prins v. South Branch Lumber Co.* 20 Ill. App. 236; *Horton v. Horton*, 71 Iowa, 448, 32 N. W. 452.

It is true that where an alteration appears on the face of the note, the holder must explain it, and show that it was made under such circumstances as not to vitiate the instrument: 3 *Randolph on Commercial Paper*, 2d ed., sec. 1785; *Walters v. Short*, 5 Gilm. 252; *Hodge v. Gilman*, 20 Ill. 437. In the case at bar, the note was admitted in evidence by the court upon an inspection thereof. The presumption is, that there were no alterations apparent upon the face of the note which required explanation, or the court would not have admitted it in evidence without first calling for proof explaining the alterations. Whether or not the court erred in so admitting the note without requiring such explanatory proof is a matter which cannot be determined by us, because the original note has not been produced for our inspection. Such a course should have been pursued: *Riley v. Dickens*, 19 Ill. 29; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Prins v. South Branch Lumber Co.*, 20 Ill. App. 236.

Some of the instructions are erroneous, as leaving it to the jury to determine the question of implied knowledge ¹⁵⁵ and implied authority, whereas express knowledge and express authority are questions of fact, and implied knowledge and implied authority are questions of law: *Pahlman v. Taylor*, 75 Ill. 629.

4. Appellant complains that the trial court erred in refusing to allow him to introduce proof to show that he had signed numerous other notes for Silverman, and that they had been altered in amount and negotiated for different sums of money. We concur in the following view upon this subject, expressed by the

appellate court in its decision in this case: "It was not claimed, however, that the appellees ever held any of these notes, or were in any way connected with or aware of them at the time they purchased the note in question, and the court properly sustained objection to this proof."

The judgment of the appellate court is affirmed.

Mr. Justice Hand, having been of counsel in this cause in the court below, took no part in its decision here.

Alteration.—As to negotiable instruments there is no doubt that their unauthorized material alteration after their execution by their payee, or with his authority, makes them forever thereafter inoperative: *Newman v. King*, 54 Ohio St. 273, 56 Am. St. Rep. 705, 43 N. E. 683; note to *Woodworth v. Bank of America*, 10 Am. Dec. 267-273; and when the note thus destroyed can no longer be enforced the right to hold collaterals pledged to secure its payment generally terminates: *Otto v. Halff*, 89 Tex. 384, 59 Am. St. Rep. 56, 34 S. W. 910. For one purpose an altered note continues to have some effect; viz., it prevents the payee from maintaining any action to recover upon the original indebtedness for which the note was given: *Warder etc. Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300. One dangerous exception to the general rule has generally been admitted. It is that the instrument is not avoiled by an alteration, however material, if made without fraud, and with intent to conform it to the agreement of the parties: *Otto v. Halff*, 89 Tex. 384, 59 Am. St. Rep. 56, 34 S. W. 910; *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52.

Alterations.—With respect to conveyances and like executed contracts they become operative on delivery, and the title thereby transferred cannot be divested or impaired by a subsequent alteration: *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078; but it has been held that if after delivery the grantee's name is erased with his consent and another name inserted in place thereof, it is void until delivered to the substituted grantee, and thereupon becomes operative as an original conveyance to him: *Abbott v. Abbott*, 189 Ill. 488, 82 Am. St. Rep. 470, 59 N. E. 958.

LENNARTZ v. QUILTY.

[191 ILL. 174, 60 N. E. 913.]

TRUST DEED—WRONGFUL RELEASE.—THE RIGHTS OF THE CESTUI QUE TRUST are superior to those of any person chargeable with notice that the trust deed was released in violation of its terms. (p. 261.)

PURCHASERS—RECORDS, PROTECTION OF BY.—A purchaser acting in entire good faith is protected by the public record unless there is something to put a reasonable person upon inquiry. (p. 261.)

NOTICE.—THE FACT THAT A TRUST DEED IS RELEASED OF RECORD prior to the date on or before which the note secured thereby was payable is not a circumstance to excite inquiry by an intending purchaser, and he acquires title paramount to such released trust deed though such note remained unpaid. (p. 262.)

EVIDENCE.—AN ABSTRACT OF TITLE is admissible not to show title, but as evidence of good faith on part of purchaser of property. (p. 262.)

F. P. Read, for the appellant.

Kerr & Barr and O'Donnell & Coghlan, for the appellees.

177 CARTWRIGHT, J. Nora Behrend, being the owner of certain real estate in Chicago, on March 10, 1891, together with her husband, Bernhard Behrend, conveyed the same by trust deed to Hermann Felsenthal, trustee, to secure a note of said grantor for \$3,000, due five years after date, payable to their own order, and the note became the property of Kaspar G. Schmidt. This trust deed was recorded March 12, 1891, and was the first lien on the premises. On May 2, 1892, said Nora Behrend and husband executed a second trust deed conveying said premises to Peter Popp, trustee, to secure their note for \$3,500, payable on or before five years after date, to the order of appellant. This trust deed was recorded June 8, 1892, and was the second lien. On May 9, 1893, Peter Popp, the trustee, executed a release to the Behrends of the trust deed made to him to secure appellant, and this release was recorded August 21, 1893. On December 23, 1893, Johanna Quilty purchased the premises and received a warranty deed therefor from said Nora Behrend and Bernhard Behrend, subject to the encumbrance of \$3,000 by the trust deed to Felsenthal, which was the only encumbrance of record. She was furnished with an abstract of title to the premises, and caused it to be examined by an attor-

ney, and it showed title in Nora Behrend and that the trust deed to Felsenthal was the only encumbrance. The consideration was \$5,600, of which she paid \$2,600 in cash, and as the remainder of the consideration she assumed the encumbrance of \$3,000. She had no knowledge or notice that complainant's note had been paid, and she purchased and paid for the premises in good faith, relying upon the public records, which showed the trust deed to Popp, securing appellant, to have been released and discharged ¹⁷⁸ of record four months previously. The note of appellant was not, in fact, paid or surrendered to the makers. Bernhard Behrend continued to pay interest on the note until January, 1896, and appellant had no actual knowledge of the release until after that time. The note held by Schmidt, secured by the trust deed to Felsenthal, became due March 10, 1896, and Johanna Quilty took up the note, paying \$300 in cash, and giving a new note for \$2,700, secured by a new trust deed upon the premises to Felsenthal, who thereupon released the first trust deed.

On October 20, 1898, appellant filed her bill in the circuit court of Cook county against said Nora Behrend, Bernhard Behrend, and Johanna Quilty and others, to foreclose the trust deed made to secure her. Popp was dead, and Anton Mach, his successor in trust, was made defendant. Johanna Quilty, Felsenthal, and the executors of Schmidt, who had died, answered, setting up the facts of the release and purchase and the payment of the first lien above stated. Johanna Quilty died, and her heirs were made parties and are appellees. Said heirs filed their cross-bill, praying to be subrogated to the rights of Schmidt under the first trust deed, which was released upon the payment of \$300 and giving the note and trust deed for \$2,700 in renewal. The executors of Schmidt also filed a cross-bill. The cross-bills were answered and the facts were proved to be as before stated, whereupon the circuit court dismissed the original bill at complainant's cost and also sustained demurrers to the cross-bills and dismissed them. Appellant removed the cause by appeal to the appellate court for the first district, where the decree was affirmed, and she prosecuted this further appeal to this court.

The release of the trust deed securing the note of appellant, by Popp, the trustee, was unauthorized, for the reason that the note was not paid. The appellant and Johanna Quilty both acted in good faith and were equally innocent, and the question is, Who must suffer for the ¹⁷⁹ wrong of the trustee and Bernhard Behrend, who procured the release? The release of the

premises without payment of the debt did not discharge the lien as between the original parties, and would not discharge it as to any subsequent purchaser or mortgagee with notice of the breach of trust. The rights of appellant would be superior to any person chargeable with notice that the trust deed was released in violation of its terms. The public records of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence of such title, and a purchaser may rely upon such records in security unless he has notice or is chargeable in some way with notice of some title, conveyance, or claim inconsistent therewith. In this case there was no actual notice or knowledge but Johanna Quilty, the purchaser, acted in entire good faith, and paid her money, relying upon the record of the release made on May 9, 1893, and recorded August 21, 1893, showing the payment and the discharge of the lien. Having no such knowledge, she had a right to rely upon the record unless there was something to put a reasonable person upon inquiry whether there was some infirmity in the release. The only ground for claiming that she was affected with notice that the release was fraudulent is the fact that the note of appellant was payable on or before five years after date and five years had not elapsed after its date. Payment of the note could not be enforced against the makers until the expiration of the five years, when it would become due absolutely and at all events. The makers of the note, however, reserved the right to pay it before the end of that period, so that, as far as they were concerned, the note was payable at any time. Presumably, they reserved that right in view of some expectation or probability that they would desire to exercise it. The note being payable at any time at the option of the makers, and the record showing that the payment had been made and the trust deed regularly released, we do ¹⁸⁰ not see how it could be said that Johanna Quilty should either presume or suspect that the makers of the note had not exercised their right and option to pay it. It is to be remembered that Johanna Quilty was a purchaser, whose only duty was to ascertain the condition of the title, and she was under no obligation or duty to see that the note was paid or canceled. The recording laws are designed to afford protection to parties acting in good faith and relying upon them, and, in the absence of any notice or ground of suspicion, it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record. There was nothing in this case to give notice

to Johanna Quilty that appellant had any lien upon the property, and she was protected by the record: *Ogle v. Turpin*, 102 Ill. 148; *Mann v. Jummel*, 183 Ill. 523, 56 N. E. 561.

It is alleged as error that the trial court admitted in evidence the abstract of title to the premises. It was admitted in connection with the testimony of the attorney who examined it, not to show title but to prove that Johanna Quilty relied upon the record and the written opinion of the attorney as to the state of the title, and it was competent to show good faith on her part.

The only other ruling complained of is that the court excluded testimony of the appellant, and held it incompetent as against the heirs of Johanna Quilty. Her counsel asked her only one question, and that was whose property the \$3,500 note was. The note was payable to her order and there was no dispute about her ownership. There was no offer to prove anything else by her, and, whether the ruling was right or not, appellant was not harmed by it.

The judgment of the appellate court is affirmed.

Records.—One purchasing property is justified in relying on the records as they are: See the monographic note to *Day v. Brenton*, 63 Am. St. Rep. 471.

A Release of a Trust Deed by a Trustee without payment and without authority from the cestui que trust is void: See the monographic note to *Day v. Brenton*, 63 Am. St. Rep. 472, on acts of trustees in contravention of their trusts. Consult, also, *Borgess Investment Co. v. Vette*, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754; *Demuth v. Old Town Bank*, 85 Md. 815, 60 Am. St. Rep. 822, 37 Atl. 266.

PETERSON v. GIBSON.

[191 Ill. 365, 61 N. E. 127.]

BENEFIT SOCIETIES—RIGHTS OF BENEFICIARY.—As a general rule, the beneficiary does not acquire a vested right to mortuary fund, but, during the member's lifetime, a mere expectancy, subject to defeat by the power of appointment vested in him. (p. 264.)

BENEFIT SOCIETIES.—THE CONSTITUTION IS IN NO SENSE THE CHARTER, but merely a code of laws adopted by the association. (p. 265.)

BENEFIT SOCIETIES—BY-LAWS, EFFECT OF CHANGES IN.—The contract of membership cannot be impaired by subsequent enactments or change in by-laws unless the member, in express terms, has agreed to be bound by such enactments or changes as may thereafter be enacted. (p. 266.)

BENEFIT SOCIETY — BY-LAWS.—POWER TO AMEND constitution and by-laws is passed by association as an attribute of its corporate life. (p. 267.)

BENEFIT SOCIETY — AMENDMENT OF BY-LAWS.—A clause in by-laws providing for amendment does not constitute an express agreement to be bound by such amendment where the same takes away a vested right or impairs an original obligation. (p. 267.)

APPEAL.—THE APPELLATE COURT'S ACTION, when not assigned as for error, is not subject to review on appeal to supreme court. (p. 268.)

M. C. Harper and O. C. Peterson, for the appellant.

George G. Bellows, for the appellee.

³⁶⁶ **BOGGS, J.** Leander E. Nelson, now deceased, at the time of his death, was a member in good standing in the Scandinavian Mutual Aid Association. He was admitted to membership on the eighth day of November, 1886, and on that day received a mortuary benefit certificate issued by the said association in the sum of three thousand dollars, to be paid to Eva Nelson, his mother, and appellant Peterson's intestate, she having died during the pendency of this proceeding. The said Leander E. Nelson departed this life March 12, 1897, leaving a last will and testament, which was duly admitted to probate. The will appointed appellee Gibson executor, and provided that the provision in the benefit certificate making said Eva Nelson sole beneficiary of the mortuary fund should be revoked, and that such fund should be bequeathed and made payable as follows: One thousand dollars to his mother, said Eva Nelson; one dollar each to Minnie Peterson, Hannah Cederstrom, John Nelson, and Gustav Nelson, and the remainder to the appellee, James W. Gibson. Said Eva Nelson, who was then living, asserted a claim to the entire amount of said mortuary fund, and said appellee, Gibson, as legatee under the will of said Leander E. Nelson, and as executor thereof, claimed the right to receive all of such mortuary fund above the sum of one thousand dollars, in accordance with the will of the deceased assured. Under a bill of interpleader filed by the association, these rival claimants were brought into court and required to submit their contentions to the court for determination. The association ³⁶⁷ deposited in court the mortuary fund, less thirteen dollars allowed it for costs in that behalf, and was dismissed from the proceeding. Upon a hearing the chancellor sustained the right of the assured to dispose of the mortuary fund by will, and the decree was affirmed in the appel-

late court for the first district on appeal. This is a further appeal from the judgment of the appellate court.

Section 1 of the act of June 18, 1883 (1 Starr & Curtis' Statutes of 1885, p. 1348), under which the Scandinavian Mutual Aid Association was incorporated, authorized the association to furnish life indemnity or pecuniary benefits to certain relatives by consanguinity or affinity and to the "devisees or legatees" of deceased members. This section was in full force, and in nowise modified or changed when said Leander E. Nelson received his beneficiary certificate, on the eighth day of November, 1886. Nor had the association, by by-law or otherwise, attempted to place any restriction on the right of any member to appoint by his last will a beneficiary other than the person named in the certificate to receive the mortuary fund. In such associations the beneficiaries do not, as a general rule, acquire a vested right to the mortuary fund, but during the lifetime of the member have a mere expectancy only, subject to be defeated by the exercise of the power of appointment which is vested in the member: *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Moore v. Chicago Guaranty Fund Soc.*, 178 Ill. 202, 52 N. E. 882; *Bloomington Mut. Ben. Assn. v. Blue*, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; *Voigt v. Kersten*, 164 Ill. 314, 45 N. E. 543. The power of appointment thus vested in the assured member may be divested by future changes in the constitution of the association or the organic law under which it is organized, if it was made a part of the contract admitting the assured to membership that his right in this respect should be subject to such future changes in the law governing the association, but otherwise the power of appointment is a vested right, and cannot be taken away by any subsequent enactment or change in the laws of ³⁶⁸ the association: *Voigt v. Kersten*, 164 Ill. 314, 45 N. E. 514; *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065.

The contention of the appellant is, that the said assured, as a part of the contract admitting him to membership in the association agreed that he would comply with, and be bound by, the constitution and by-laws of the association as such constitution and by-laws might or should be amended or changed in the future, and appellant further contends that the constitution and by-laws of the association were subsequently so legally amended and changed as to divest the said member of the right to change the beneficiary by his last will.

The insistence that it was part of the contract that the association reserved to itself power to change and amend the constitution and by-laws, and that the said Leander E. Nelson agreed that power should be so reserved, and that he should be bound by the constitution and by-laws as they might be thereafter amended, is based alone upon a clause or provision found in the certificate of membership issued to the said Nelson. The provision in the certificate is as follows: "This certificate is issued upon the condition that the said Leander E. Nelson shall comply with the constitution and by-laws of the association, and that the statements made in the application for this certificate are true." A copy of the constitution and of the by-laws of the association was attached to the certificate of membership and made a part thereof. Section 7 of article 9 of said constitution as it stood at the time said certificate was issued to Nelson was as follows: "The constitution can be amended and changed at the annual meeting of the association by a majority of two-thirds of all the members present." It should here be noted that that which is referred to as the constitution of this association is in no sense the charter of the association. What is here referred to as the constitution is but a code of laws adopted by the association. It is correctly said in *Supreme Lodge v. 369 Knight*, 117 Ind. 489, 20 N. E. 479: "A constitution of a voluntary association or a corporation is nothing more than a by-law under an inappropriate name."

The clause in the certificate does not purport to bind the member to the observance of constitutional provisions or by-laws other than such as then existed, and a copy of the so-called constitution and by-laws then in force was attached to the certificate as a part thereof. It was the constitution and the by-laws so made a part of the certificate to which the certificate had reference and which the member consented to obey. It is only when a member, in express terms, agrees to be bound by such constitutional amendments or by-laws as may thereafter be enacted that he is bound by future amendments or by-laws which impair the obligations of his contract of membership injuriously: *Covenant Mut. Life Assn. v. Kentner*, 188 Ill. 431, 58 N. E. 966; *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065. In the absence of such an express agreement the contract of membership cannot be impaired by subsequent changes effected by the association. The constitutional provision contained in said section 7 of article 9 of the constitution of the association at the time of the admission of said Nelson to membership in the association, to the

effect that the constitution could be amended and changed at an annual meeting of the association by a majority of two-thirds of all the members present, cannot be construed to authorize an amendment or change in the constitution which should act retrospectively, and impair the obligation of the contract entered into between the association and said Nelson prior to such amendment of the constitution.

As before remarked, that which is called the constitution of the association is but a code of by-laws adopted by the association. The association had inherent power to enact by-laws consistent with the provisions of the enactment under which it was organized, and not repugnant to the constitution of the state of Illinois, and to alter ³⁷⁰ and amend such by-laws. The by-law incorporated in the code called the constitution, relative to amendments and changes in such code, did not confer upon the association the right or power to make such amendments or changes. The association possessed that power as an attribute of its corporate life. The said section 7 of article 9 of the code of by-laws had no other effect than to declare the mode or manner of exercising the power of amendment possessed by the association, viz., by a majority of two-thirds of all the members present at the annual meeting. If the section had been wholly omitted from the constitution or by-laws, the association would have had ample power to pass any lawful amendment of the constitution or by-laws: Niblack on Benefit Societies, sec. 28, p. 105; 1 Bacon on Benefit Societies, 2d ed., sec. 9. The assent of the assured, therefore, did not confer any power on the association which without such assent it had not, nor did it bind the assured to submit to any amendment to which he could not be compelled to submit in the absence of said section 7. His assent was that the association, at any annual meeting, might make any change or amendment lawful to be made, by a majority of two-thirds of all the members present, and cannot be construed as an assent to the adoption of a by-law divesting him of a vested right and impairing the obligation of his contract of membership. Section 14 of article 2 of the constitution of 1870 inhibited the general assembly from adopting any statute impairing the obligation of such contract of membership. Subsequent enactments of the legislature or future amended by-laws of the association could not operate retrospectively, and thus divest the vested rights of a member or destroy existing contract obligations. In revoking the direction of the certificate as to the person to receive the mortuary benefit, and in appointing others as

beneficiaries to receive such fund, said Leander E. Nelson but exercised a legal right of which he was possessed.

ST1 A portion of the brief in behalf of appellee is devoted to the criticism of the action of the chancellor in relieving the appellant from the payment of any portion of the cost of the proceeding. The appellate court affirmed the action of the chancellor in respect of the order as to costs. The action of the appellate court in that respect is not assigned as for error in this court, and for that reason is not subject to review in this court.

The judgment of the appellate court is affirmed.

Benefit Society.—A beneficiary has no vested right, ordinarily, under a benefit certificate issued by a benevolent association until the death of the member: *Independent Foresters v. Keliher*, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 1109, 60 Pac. 563; monographic notes to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 564; *Strauss v. Mutual Reserve etc. Assn.*, 83 Am. St. Rep. 718.

The By-laws of a Benefit Society Cannot be Changed, without the knowledge or consent of a member, so as to impair his contract with the society, unless he accepts a certificate expressly subject to the power of the association to amend its constitution and by-laws: See the monographic notes to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 557; *Strauss v. Mutual Reserve etc. Assn.*, 83 Am. St. Rep. 706.

PEOPLE v. PETRIE.

[191 Ill. 497, 61 N. E. 499.]

BENEFIT SOCIETY—EXECUTOR'S INTEREST.—A benefit certificate payable to the devisees of the certificate holder as provided in his last will and testament is payable to the person named in such will, and not to the executor. (p. 270.)

EXECUTORS AND ADMINISTRATORS TAKE AND ADMINISTER upon the estate owned by the deceased as it existed at the time of his death. (p. 270.)

EXECUTOR'S BOND—LIABILITY OF SURETIES.—AN EXECUTOR, WHO IS ALSO TRUSTEE of a fund by the will, does not, in his dealings with the trust fund, create any liability against sureties upon his bond as executor. (p. 275.)

EXECUTOR AND TRUSTEE—BONDS OF.—A court of chancery has power and jurisdiction to require a trustee, who is also executor under the will appointing him trustee, to execute a bond, with sufficient sureties, conditioned for the faithful performance of the trust and the preservation of the fund. (p. 277.)

NOMINAL DAMAGES.—A NEW TRIAL will not be awarded merely to enable the recovery of nominal damages. (p. 277.)

NEW TRIAL—GROUNDS OF.—The party moving for a new trial is restricted to the reasons assigned therefor when motion made. (p. 277.)

James M. Brock and W. J. Graham, for the appellants.

Guy C. Scott and Bassett & Bassett, for the appellees.

⁵⁰⁴ **MAGRUDER, J.** This suit is brought for the purpose of holding the appellees, Richard S. Petrie and Cornelius L. Petrie, liable as sureties upon the executor's bond of Alexander P. Petrie, deceased, for the five thousand dollars paid to said Alexander P. Petrie, on February 11, 1887, by the Covenant Mutual Benefit Association of Illinois upon the insurance certificate hereafter described. ⁵⁰⁵ The liability or nonliability of appellees, as such sureties, depends upon the solution of the question whether or not the executor, Alexander P. Petrie, received the sum of five thousand dollars, being the amount of the insurance certificate, as executor, and held it in his hands as executor up to the date of his death on December 5, 1898. If Alexander P. Petrie did not originally receive or subsequently hold said money as executor, but received it as an individual, or as trustee for the widow and heirs of Benjamin F. Brooks, deceased, then the sureties on his executor's bond would not be liable, as their contract, evidenced by their bond, was for his performance of his duty as executor, and not otherwise.

1. The first question in the case, then, is this: Were the proceeds of the benefit certificate, paid to Alexander P. Petrie, and amounting to five thousand dollars, assets of the estate of Benjamin F. Brooks, or not? The general rule is, that the proceeds of such a certificate are not assets of the estate.

"Moneys received on a certificate of membership in a mutual benefit association, the constitution and by-laws of which provide for insurance for the benefit of the member's family, or for such persons as the member may designate, go, on the death of the member, to his family, or the person designated by him, and are not assets subject to the payment of his debts": 11 Am. & Eng. Ency. of Law, 2d ed., 847, and cases in note 1. Elsewhere in the same encyclopedia (volume 3, page 1108), it is said: "The right to receive benefits becomes vested in the legally designated beneficiary immediately upon the death of the member while in good standing, and the amount apportioned from the fund should be paid direct to such beneficiary, not to the executor or administrator of deceased."

In addition to the fact that the money realized upon these benefit certificates is for the benefit of the certificate holder's

family, or heirs, or devisees, or those dependent upon him, the rule that the proceeds of such a ⁵⁰⁶ certificate are not assets of the estate of the deceased certificate holder rests upon the further fact that the proceeds of the certificate are not his property at the time of his death. An executor or administrator takes, and administers upon, the estate owned by the testate or intestate as it existed at the time of his death. The certificate holder is not entitled to realize the amount due upon the certificate while he is alive. Only the beneficiary named in the certificate takes the money, and this can only be after the death of the certificate holder.

Moreover, the contract of the benefit association or insurance company is to pay the money, due upon the certificate, to the beneficiary designated upon the face of the certificate. The contract is to pay to the person so designated, and not to pay to the estate or representatives of the certificate holder, unless the latter are specially designated by the certificate itself as the persons entitled to take the money.

A person in his lifetime took out a policy of insurance payable to his "heirs and assigns"; he died intestate, unmarried and childless, and leaving as his heirs at law a sister, two nieces, and a nephew; a question arose as to whether his creditors or his heirs at law should have the fund derived from the policy, and it was held that the heirs were entitled to the proceeds of the policy; and it was further held, in regard to the meaning of the word "heirs," that reference was had to the statute simply for the purpose of ascertaining who were the beneficiaries of the policy, but that, when they were thus ascertained, their right to the money was derived, not from the statute, but solely from the contract embraced in the policy; that is to say, that the next of kin of the deceased were entitled to take the proceeds of the policy by virtue of the contract he had made in their behalf with the insurance company; and, in so holding, the following language was used: "In other words, they take the proceeds, not as heirs or distributees of the deceased, but as purchasers. ⁵⁰⁷ This being so, the proceeds of this policy were not, under the facts of this case, any part of the estate of the assured, and, therefore, not subject to the claims of his creditors": *Hubbard v. Turner*, 93 Ga. 752, 20 S. E. 640, 30 L. R. A. 593, and cases in note.

In the case at bar the benefit certificate or life insurance policy provides as follows: "The association hereby agrees well and truly to pay, or cause to be paid, as a benefit to his devisees, as provided in last will and testament, or, in the event of their

prior death to the legal heirs or devisees of the certificate holder," etc. There is no contention here that the devisees named in the will of Benjamin F. Brooks died, and, therefore, the words "or, in the event of their prior death, to the legal heirs or devisees of the certificate holder," may be considered as eliminated. By the terms of the certificate the association agrees "to pay, or cause to be paid, as a benefit to his devisees, as provided in last will and testament." The contract between the association and Benjamin F. Brooks was for a payment "to his devisees as provided in last will and testament," and not to his executors. The contract was made directly for the benefit of his devisees. We turn, therefore, to his will to learn who are his devisees, as provided therein. The third clause of the will says: "I give and bequeath to A. P. Petrie, in trust for my legal heirs before named, the proceeds of one certificate of life insurance in the Covenant Mutual Benefit Association of Galesburg, state of Illinois, numbered 620, for the sum of five thousand dollars (\$5,000), which I have had made payable to said A. P. Petrie, to be disposed of as follows, to wit," etc. The contract, therefore, of the association was to pay the money to A. P. Petrie in trust for the legal heirs of Benjamin F. Brooks, as named in his will. In the third clause of his will he expressly states that he had made the certificate payable to said A. P. Petrie to be disposed of in a certain way, and thereby himself designated A. P. Petrie, ⁵⁰⁸ trustee, as the devisee intended by the language of the insurance certificate. As in the case of *Hubbard v. Turner*, 93 Ga. 752, 20 S. E. 640, the statute may be referred to to ascertain who the heirs are when the certificate is for the benefit of "heirs," so the will may be referred to for the purpose of ascertaining who the devisees are when the certificate is made out for the benefit of devisees, as the beneficiaries. In neither case, however, is the right to the money derived from the statute or the will, but solely from the contract embodied in the policy.

The foregoing views are sustained by the following authorities: *Alexander v. Northwestern Masonic Aid Assn.*, 126 Ill. 558, 18 N. E. 556; *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108, 29 N. E. 480; *Covenant Mut. Ben. Assn. v. Hoffman*, 110 Ill. 603; *Gauch v. St. Louis Mut. Life Ins. Co.*, 88 Ill. 251, 30 Am. Rep. 554; *Worley v. Northwestern Masonic Aid Assn.*, 10 Fed. 227; *Smith v. Covenant Mut. Ben. Assn.*, 24 Fed. 685.

In *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108, 29 N. E. 480, the language of the benefit certificate was the same as that in the case at bar—that is to say, the association there agreed "to

pay, or cause to be paid, as a benefit to his devisees, as provided in last will and testament, or in the event of their prior death, to the legal heir or devisees of the certificate holder"; and it was there held that the promise was, in substance, to pay his devisees, if there should be devisees to take, and, if not, then to pay to his heirs.

In *Alexander v. Northwestern Masonic Aid Assn.*, 126 Ill. 558, 18 N. E. 556, a certificate of life insurance in a benevolent society was taken, payable to the "devisees or heirs at law" of the certificate holder, and it was there said (126 Ill. 561, 18 N. E. 557): "It is not claimed, as we understand the argument, by either side that the fund is assets belonging to the estate of the deceased, which would pass to the administrators to be used by them in the payment of debts and in the settlement of the estate, but it is conceded that the fund should be paid to the person or persons named in the certificates. . . . If Alexander had executed a will, and therein ⁵⁰⁰ devised the fund to a person or persons therein named, such person or persons, beyond all doubt, would have been entitled to the fund."

In *Worley v. Northwestern Masonic Aid Assn.*, 10 Fed. 227, it was held that a policy, or certificate of a corporation incorporated for benevolent purposes, under the provisions of state statutes, by the terms of which the corporation agreed to pay to the devisees of the deceased a sum of money within a certain number of days after receiving evidence of his death, was not a part of the estate of the deceased nor recoverable as such by his administrator.

There is a class of cases, some of which are referred to by counsel for the appellants, which seem to hold the contrary of this view; but it will be found that, in such cases, the language used in the certificate indicated an intention on the part of the deceased certificate holder, that the proceeds of the certificate should be a part of his estate, and should go to his administrator or executor for the payment of debts. Thus, in *People v. Phelps*, 78 Ill. 147, the policy by its express terms was payable to the party's "legal representatives"; and it was there held that the proceeds of the certificate would be assets in the hands of the executor or administrator, and subject to the payment of debts, because the words "legal representatives," in the commonly accepted sense, meant administrators or executors: *Warnecke v. Lembca*, 71 Ill. 91, 22 Am. Rep. 85. The cases referred to by counsel for appellants are clearly distinguishable from the case at bar. In *Harding v. Littlehale*, 150 Mass. 100, 22 N. E. 703,

it was held that the proceeds of a benefit certificate, after the death of a member, would go to his executor or administrator as a part of his estate; but there, under a special statute, a benefit association might insure a member for his own benefit; and, of course, in such case, when he died, the proceeds of the certificate would belong to his estate. In *Union Mutual Life Ins. Co. v. Stevens*, 19 Fed. 671, the money, accruing on the policy at the death of the certificate ⁵¹⁰holder, was held to be assets in the hands of the administrator upon the ground that the assured himself appeared by name in the policy as the beneficiary: *Kelley v. Mann*, 56 Iowa, 625, 10 N. W. 211; *McClure v. Johnson*, 56 Iowa, 620, 10 N. W. 217. In *Kelley v. Mann*, 56 Iowa, 625, 10 N. W. 211, where it was held that a policy of life insurance was not liable for the debts of the assured, but was collectible by his administrator, to be distributed by him, according to law, the policy was payable to the "legal representatives" of the assured.

In the case at bar, where the policy or certificate is payable to "devisees, as provided in last will and testament," the proceeds of the certificate or policy might be regarded as belonging to the estate, and liable for the debts thereof, if upon turning to the will, it had been found that the proceeds had been devised to the legal representatives of the estate of Benjamin F. Brooks, deceased, or to Alexander P. Petrie, as the executor of that estate. By the terms of the third clause of the will, however, the devise or bequest—for the term "devisee" accompanying a bequest of personalty will be held to mean "legatee" (5 Am. & Eng. Ency. of Law, 1st ed., 660)—is not to A. P. Petrie, as executor, but to A. P. Petrie, individually, in trust for a certain purpose, without any designation of, or reference to, his representative capacity. The proceeds were devised or bequeathed to him in trust for the legal heirs named in the will, and to be disposed of in the following way, to wit: "The principal to be kept at interest until the death of my wife, Ellen L. Brooks, or until my youngest child then living shall have attained the age of twenty (20) years, should the death of my wife occur before the said child shall have attained that age, at the rate of eight per cent per annum, the interest or income to be paid to my wife, Ellen L. Brooks, quarterly." Such is not the language used in imposing duties upon an executor who is expected, as a general thing, by the terms of the statute, to settle up the estate at the expiration of a period of two years. The proof shows that the ⁵¹¹youngest child of the testator, at the time of his death, was not more than three years of age. The proof also shows that A.

P. Petrie continued to pay interest on the "trust fund" to the widow, Ellen L. Brooks, for more than eleven years after he was appointed executor of the estate.

It is thus apparent that, by the terms of this will, A. P. Petrie was both trustee and executor. The declaration itself concedes the existence of this dual capacity by averring that he never at any time filed a bond, or qualified as trustee under said will, nor ever turned over the funds in his hands as executor to himself as trustee. The contention of the appellants is, that A. P. Petrie held the fund in his hands as executor from the time of his appointment as such by the county court in November, 1886, to the time of his death, in December, 1898, a period of twelve years.

2. The next question in the case is whether A. P. Petrie held the trust fund in question as executor, instead of holding it as trustee, upon the ground that having been, by the terms of the will, both trustee and executor, he never gave a bond as trustee; and upon the further ground that, even if the fund in question was not originally legal assets of the estate, yet it was in fact taken and treated as such by the executor; that, having thereby become assets in the hands of the executor, it remained such up to the time of the death of A. P. Petrie; and that, therefore, the bondsmen of the latter should be holden for it. There is much force in the position taken by the appellants in reference to this matter.

In his petition to the county court to be appointed executor, A. P. Petrie mentioned the proceeds of the benefit certificate as a part of the estate of which Benjamin F. Brooks died possessed. In his inventory presented to the county court, he also mentioned the insurance policy or certificate as a part of the estate of Benjamin F. Brooks. The bond, also, which he gave as executor was ^{\$12} fixed in a sufficiently large amount to cover the proceeds of the certificate. It is to be observed, however, that when he gave a receipt to the benefit association or insurance company for the amount of the policy, he signed the receipt in his individual name, and not as executor. It is also to be noticed that, although the amount of the widow's award exceeded the whole value of the personal property owned by the deceased, excluding the certificate or policy, yet no amount was taken out of the proceeds of the certificate to pay such deficiency in the award. Nor was any part of the proceeds of the certificate applied toward the payment of any of the debts of the deceased, if there were any. It is true that the first receipt, signed by the

widow for interest on the trust fund, recites that such interest is "received of A. P. Petrie, executor of B. F. Brooks"; and that the sixth receipt, dated in May, 1888, executed by the widow for interest on the trust fund, recites that such interest is "received of A. P. Petrie, administrator of the estate of B. F. Brooks." These receipts, however, were not signed by A. P. Petrie, but by Ellen L. Brooks, the widow. Nor is there any evidence that they were drawn by A. P. Petrie. The fact, therefore, that he is described in one of them as executor, and in the other as administrator, is not significant, as indicating that he held the fund in the capacity of executor. If the receipts are important evidence upon this subject, the majority of them would indicate that the interest on the fund was not paid by him as executor, but, on the contrary, as trustee, because the remaining sixteen of the receipts, commencing on February 18, 1887, and ending on August 18, 1898, all of which are signed by the widow, recite that interest on the "trust fund" of the estate of B. F. Brooks is "received from A. P. Petrie," thus designating him as an individual or in his capacity as trustee, and not in his capacity as executor.

The fact that the executor mentioned the fund in his petition for appointment, and in his inventory, as being ⁵¹³ a part of the property of the estate, has no other or different significance than if, in a report by him as executor, he had charged himself as executor with the trust fund in question. Such a charge, made by the executor against himself, has been held not to create a liability against the sureties upon his bond, if they were not otherwise liable under the law or the statute.

In *Clay v. Hart*, 7 Dana, 1, it was held that "the sureties of an executor cannot be made liable for funds which the executor received as agent or trustee for a legatee, though he has charged himself with them in his executorial accounts."

In *Shields v. Smith*, 8 Bush, 601, it was held that the sureties of an administrator, with the will annexed, could not be held liable for funds which he received, not as administrator, but as agent for the widow and heirs, though he charged himself with such funds as administrator.

In *Commonwealth v. Gilson*, 8 Watts, 214, it was held that the sureties in an ordinary administration bond are not liable for the proceeds of an intestate's real estate, though charged in the account of an administrator, as settled by the orphans' court.

Again, in *Pace v. Pace*, 19 Fla. 454, where the subject out of which the suit arose, was a contract of insurance made by a life

insurance company, and where it was held that the administrator would not hold the proceeds of the policy as general assets in his hands liable to the payment of debts or to distribution according to the law of the domicile of the intestate, it was said: "The sureties upon the bond of an administrator who has collected moneys, neither assets of the estate nor subject to distribution by him, and to which, as the legal representative of the decedent, he was not entitled, are not liable for any appropriation or use of the same by the administrator for his personal benefit."

In *Robinson v. Millard*, 133 Mass. 236, which case is referred to with approval by this court in *People v. Huffman*, ⁵¹⁴ 182 Ill. 390, 55 N. E. 981, the supreme court of Massachusetts said: "The fact, therefore, that the executors here saw fit to charge themselves in their general account with the balance remaining after payment of debts, legacies, and charges, does not conclude the sureties under the general bond."

In *People v. Huffman*, 182 Ill. 390, 55 N. E. 981, it was held by this court that the report of an executor, showing a certain balance in his hands as of the date of his report, is not conclusive on his sureties in an action to enforce their liability on the bond, when the report was not approved by an adjudication of the court. Therefore, under the authorities, it cannot be said that the circumstances relied upon by the appellants, as indicating that the fund in question was treated by the executor as a part of the assets of the estate, are conclusive upon the sureties so as to make them liable. The liability of a surety is *strictissimi juris*: *People v. Toomey*, 122 Ill. 308, 13 N. E. 521.

The general doctrine is, as announced by Woerner in his work on the American Law of Administration, volume 1, second edition, section 260, that "where a will makes the same person executor and trustee, the executor's bond cannot be construed as conditioned for the performance of the duties belonging to the trustee; a separate bond should in such case be given as trustee."

In *Hinds v. Hinds*, 85 Ind. 312, it was held that the bond of an executor, given to secure the faithful discharge of his duties as executor, cannot be construed as conditioned for the faithful discharge of his duties as trustee of a trust created by the will. This same doctrine was recognized and approved by this court in *People v. Huffman*, where we said (182 Ill. 405, 55 N. E. 985): "Under the statute as it now stands, where a will makes the same person executor and trustee, the executor's bond cannot be construed for the faithful performance of the duties belonging to the trustee. A separate bond should be given by the trustee."

As was said in *Hinds v. Hinds*, 85 Ind. 312, it does not ⁵¹⁵ follow from this doctrine that the cestui que trust need be without any security except the personal responsibility of the trustee for the faithful discharge of the duties of his trust, because a court of chancery has the power and jurisdiction to require the trustee in such a trust to execute bond with sufficient sureties conditioned for the faithful performance of the duties of his trust, and for the preservation of the trust fund.

3. It is contended on the part of the appellants that, inasmuch as A. P. Petrie failed to file any report as executor, the plaintiffs below were entitled to nominal damages, and that the judgment should, therefore, be reversed and the cause remanded for this reason.

Upon this point we are content with what is said by the appellate court in their decision of this case, which is as follows (94 Ill. App. 663): "This point is purely technical, for, if we are correct in concluding this fund was not part of the estate to be accounted for to the county court, then the papers filed there by the executor showed he had turned over to the widow all the personal property of the estate; and the only report he could have made would have been to formally charge himself with said property and credit himself for its delivery to the widow; that is, to state in the form of a report only facts and figures already appearing in papers filed by the executor in 1886. Plaintiffs tendered various propositions of law, but none upon the subject of the right to recover nominal damages, because of the failure to file a report. They moved for a new trial, and filed the points relied upon therefor, and did not assign failure to award nominal damages as one of them. They are restricted to the reasons they then assigned. Besides, courts will not award a new trial merely to enable a party to recover nominal damages": *Comstock v. Brosseau*, 65 Ill. 39.

For the reasons above stated, the judgments of the appellate court and of the circuit court are affirmed.

Benefit Society.—Money due upon the certificate of a member of a benefit society at the time of his death forms no part of his estate, but belongs to his heirs named as beneficiaries: See the monographic note to *Leavitt v. Dunn*, 44 Am. St. Rep. 409.

The Bond of an Executor Does not Cover Duties imposed on him, not in his representative capacity, but as a trustee under the will. There is authority, however, to the contrary: See the monographic note to *Commonwealth v. Stub*, 51 Am. Dec. 522.

WILLIAMS v. WEST CHICAGO STREET R. R. CO.

[191 ILL. 610, 61 N. E. 456.]

REWARD.—SUBSTANTIAL COMPLIANCE WITH ENTIRE TERMS OF OFFER is necessary before claimant becomes entitled to a reward. (p. 279.)

REWARD.—NO APPORTIONMENT OF AN AWARD can be made for partial service. (p. 279.)

REWARD BUT PARTLY EARNED.—TO FURNISH INFORMATION that leads to arrest merely does not entitle one to a reward offered "for the arrest and conviction." (p. 282.)

REWARD.—SERVICES RENDERED IN IGNORANCE of the offer of reward do not entitle the party to the reward. (p. 282.)

Pease & Polkey, Oscar B. McGlasson, and Henry C. Beitler, for the appellant.

John A. Rose, Louis Boisot, and W. W. Gurley, for the appellee.

612 HAND, J. This is an action of assumpsit, brought by the appellant against the appellee in the circuit court of Cook county, to recover a reward offered by the appellee for the arrest and conviction of the murderer or murderers of C. B. Birch, who was killed while in the service of the appellee, which, as published, was in the following terms:

"\$5,000 Reward.

"OFFICE WEST CHICAGO STREET RAILROAD CO.

"June 24, 1895.

"The above reward will be paid by the West Chicago Street Railroad Company for the arrest and conviction of the murderer or murderers of C. B. Birch, who was fatally shot while in discharge of his duty as receiver, on the morning of June 23d, at the Armitage avenue barn.

"CHARLES T. YERKES, Pres't."

At the close of all the evidence the court directed the jury to find the issues for the defendant, which was accordingly done, and a judgment having been rendered on said verdict, which judgment has been affirmed by the appellate court for the first district, a further appeal has been prosecuted to this court.

At about 2 o'clock on Sunday morning, June 23, 1895, Birch, whose duty it was to receive the money brought in by the conductors, was fatally shot at the barn of appellee located at Armi-

tage avenue, in the city of Chicago. The appellant, who was also an employé of the appellee, and whose duty consisted of going from barn to barn each night to inspect the cash registers, was in the barn from midnight until 2 o'clock in the morning, and left just before the killing of Birch. As he drove away in his buggy he noticed two men coming ⁶¹⁴ across the street toward the barn. They looked sharply at him and he looked at them. On Monday morning, June 24th, the appellant went to the appellee's office, where he met its general superintendent, who inquired of him if he saw any men near the barn as he drove away. Appellant told him that he had seen two men and that he thought he could identify them, whereupon the superintendent gave him a note and told him to go and see Captain Larson, of the police force. He called upon Captain Larson that afternoon, told him what he had seen, and gave him a description of the two men, whereupon the officer said that he had a man in custody at that time, who he thought answered the description of one of the men described by him. The man, whose name was Julius Mannow, was brought up and was identified by the appellant as one of the men he had seen near the barn as he drove away. Captain Larson told him to come to the station the next day, and in the meantime he would hunt up and have arrested the other man he had described. The murder of Birch led the police authorities to at once issue what was termed a "drag-net order"—that is, an order to the various patrolmen to arrest all suspicious characters in their respective districts, and bring them in for examination as to their whereabouts at the time of the commission of the crime. Mannow was thus arrested and brought to the station. A police officer named Jurs testified upon the trial of this cause that about two months before the time of the murder Mannow had narrated to him a plan for the robbing of a coal office in the manner in which the Armitage avenue robbery was accomplished, and had described Joseph Windrath as concerned in the plan, and that after the Armitage avenue robbery, and the murder of Birch, the witness at once recalled this fact and suspected Mannow and Windrath, and took steps to cause their arrest. This was before the information was given by the appellant. On Tuesday morning, the twenty-fifth day of June, the appellant for the ⁶¹⁵ first time learned of the offered reward by reading the same as published in the "Chicago Tribune." Afterward, on that day, he went again to the police station and identified Windrath, who had been arrested in the meantime, as the man he had seen in company with Mannow

near the barn just before the killing. The services rendered by the appellant in connection with the arrest and conviction of Mannow and Windrath after he knew of the offered reward consisted in his identification of Windrath, and his testifying before the coroner's jury, the grand jury, and upon the trial in the criminal court that he had seen Mannow and Windrath together near the Armitage avenue barn on the night and near the time of the commission of the crime. Other information was obtained by the police authorities shortly after the identification of Mannow and Windrath which fastened the crime upon the two men. Mannow pleaded guilty and Windrath was tried and convicted. The offered reward was paid by the appellee to another claimant.

The offer of a reward remains conditional until it is accepted by the performance of the service, and one who offers the reward has the right to prescribe whatever terms he may see fit, and such terms must be substantially complied with before any contract arises between him and the claimant. Thus, if the reward is offered for the arrest and conviction of a criminal, or for his arrest and the recovery of the money stolen, both the arrest and conviction or arrest and recovery of the money are conditions precedent to the recovery of the reward, and when the offer is for the delivery of a fugitive at a certain place, the reward cannot be earned by the delivery of him at another place, and an offer for a capture of two is not acted upon by the capture of one. The reward cannot be apportioned. The offer is an entirety, and as such must be enforced, or not at all: 21 Am. & Eng. Ency. of Law, 1st ed., 391-397; Hogan v. Stophlet, 179 Ill. 150, 53 N. E. 604; Furman v. Parke, 21 N. J. L. 310; Fitch v. Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Juniata County v. McDonald, 122 Pa. St. 115, 15 Atl. 696; Shuey v. United States, 92 U. S. 73.

In Hogan v. Stophlet, which was an action for the recovery of a reward offered for the "apprehension and conviction of a criminal," this court said (179 Ill. 153, 53 N. E. 605): "The reward was offered for the apprehension and conviction of the person or persons who burned or caused the building to be burned. It thus appears that the reward was offered, not for the conviction alone, but for the apprehension and conviction of the guilty party. Appellant is entitled to recover for both or he cannot recover at all. The reward cannot be apportioned—that is to say, there can be no apportionment of it between what is due for the apprehension and what is due for

the conviction. The offer must be enforced as an entirety, or not at all."

In *Furman v. Parke*, 21 N. J. L. 310, the reward was "for the apprehension and conviction of such person or persons as may have been implicated in the murder of John B. Parke, John Castner, Maria Castner and child." The court say: "The reward is to be paid for the apprehension and conviction, not of one of several persons implicated, but of the person [if one] or the persons [if more than one] who were implicated, not in the murder of John B. Parke alone, but of John B. Parke and three other persons. . . . The person, therefore, to be entitled to the reward, must aver and prove that the person or persons implicated in each of the four murders has or have been apprehended and convicted."

In *Fitch v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 791, the offer was "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder," etc. It appeared that the claimant gave evidence which led to the conviction of the offender, but did nothing toward securing his discovery or arrest, and it was held that he was not entitled to the reward. The court said (38 N. Y. 250, 97 Am. Dec. 793): "It is entirely clear that, in order to entitle any person to the reward⁶¹⁷ offered in this case, he must give such information as shall lead to both apprehension and conviction—that is, both must happen, and happen as a consequence of information given. No person could claim a reward whose information caused the apprehension until conviction followed. Both are conditions precedent. No one could, therefore, claim the reward who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and however clear that, had the information been concealed or suppressed, there could have been no conviction. This is according to the plain terms of the reward."

In *Juniata County v. McDonald*, 122 Pa. St. 115, 15 Atl. 696, the reward was for the capture and delivery of a criminal to the jail, and a person who furnished information from which the capture resulted, but who did not deliver the prisoner or cause him to be delivered, was held not to be entitled to the reward. The court said: "A mere reading of this paper settles the whole controversy. The reward was not offered for information as to the prisoner's whereabouts, but for his cap-

ture and delivery. How, then, could one be entitled to that reward who neither captured nor delivered him? Admitting, then, that the plaintiff gave the sheriff accurate information as to where the culprit could be found, and that he went with him and acted as one of his posse, yet on that officer fell the duty of arrest, and the plaintiff was relieved of all responsibility."

And in *Shuey v. United States*, 92 U. S. 73, which was a suit for a reward offered by the Secretary of War "for the apprehension of John H. Surratt, one of Booth's accomplices," it was held that one who had made disclosures to which were due the discovery and arrest of Surratt was not entitled to the reward for his apprehension. The court say: "It is found as a fact that the arrest was not made by the claimant, though the discovery and arrest ⁶¹⁸ were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were."

Under the authorities above cited the appellant cannot recover unless the evidence shows he caused the arrest and conviction of both Mannow and Windrath. He did neither. At most he furnished some information to the police which led to the arrest of Windrath, and identified both men as having been in the vicinity of the barn at the time of the commission of the crime, which does not bring him within the terms of the offered reward, which was for "the arrest and conviction of the murderer or murderers of C. B. Birch."

We are of the opinion that the appellant is not entitled to recover in this case for the further reason that the services performed by him were substantially all rendered before the reward was offered, or at a time when he was ignorant of the fact that a reward had been offered. After the appellant had informed the superintendent of appellee and the captain of police that he had seen Mannow and his companion near the scene of the murder at about the time the same was committed, he did nothing toward securing the conviction of the prisoners other than what he could have been required to do as a witness. The reward was not offered for information which was already

in the possession of the officers, nor for witnesses who would come forward and testify to facts which were then known to be within their knowledge, but for the arrest and conviction of the murderer or murderers. The right to recover a reward arises out of ⁶¹⁹ the contractual relation which exists between the person offering the reward and the claimant, which is implied by law by reason of the offer on the one hand and the performance of the service on the other, the reason of the rule being that the services of the claimant are rendered in consequence of the offered reward, from which an implied promise is raised on the part of the person offering the reward to pay him the amount thereof by reason of the performance by him of such service, and no such promise can be implied unless he knew at the time of the performance of the service that the reward had been offered, and in consideration thereof, and with a view to earning the same, rendered the service specified in such offer: *Fitch v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 791; *Howlands v. Lounds*, 51 N. Y. 604, 10 Am. Rep. 654; *Stamper v. Temple*, 6 Humph. 113, 44 Am. Dec. 296.

In *Stamper v. Temple*, which was an action to recover the amount of a reward, the court say: "To make a good contract there must be an *aggregatio mentium*—an agreement on the one part to give and on the other to receive. How could there be such an agreement if the plaintiffs in this case made the arrest in ignorance that a reward had been offered?"

In *Fitch v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 791, on the trial several questions were asked of the plaintiff, who was a witness in his own behalf, relative to the person to whom he gave information in relation to the murder before the reward was offered or before he heard of it. The court sustained objections thereto and excluded the evidence. The ruling of the trial court in this regard on appeal was held to be correct, and the court, on page 251 of 38 N. Y. and page 794 of 97 Am. Dec., say: "The form of action in all such cases is *assumpsit*. The defendant is proceeded against as upon his contract to pay, and the first question is, Was there a contract between the parties? To the existence of a contract there must be mutual assent, or, in another form, offer and consent to the offer. . . . Without that there is no contract. ⁶²⁰ How, then, can there be consent or assent to that of which the party has never heard? . . . The offer could only operate upon plaintiffs after they had heard of it."

And in *Howlands v. Lounds*, the court say (51 N. Y. 605, 10 Am. Rep. 655): "In order to entitle a party to recover a reward offered, he must establish between himself and the person offering the reward, not only the offer and his acceptance of it, but his performance of the services for which the reward was offered; and upon principle, as well as upon authority, the performance of this service by one who did not know of the offer and could not have acted in reference to it cannot recover."

We are of the opinion the appellant failed to make out a cause of action, and that the trial court, for the reasons above suggested, properly directed a verdict for the appellee. The judgment of the appellate court will, therefore, be affirmed.

Reward.—To entitle one to a reward, he must prove that he has substantially performed the service proposed, though it need not be performed literally: *Bease v. Dyer*, 9 Allen, 151, 85 Am. Dec. 747. One is not entitled to a reward for the capture of a thief because he gives information leading to the arrest of the thief: *Everman v. Hyman*, 26 Ind. App. 165, 84 Am. St. Rep. 283, 28 N. E. 1022. See, further, the note to *Hayden v. Souger*, 26 Am. Rep. 7-9. Where one sum is offered, and several by separate acts contribute to the conviction, they are entitled to an equitable apportionment: Note to *Hayden v. Souger*, 26 Am. Rep. 9.

Reward.—Performance in ignorance of the offer of a reward does not, according to some authorities, entitle one to the reward: *Stamper v. Temple*, 6 Humph. 113, 44 Am. Dec. 296; *Fitch v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 291; *Howland v. Lounds*, 51 N. Y. 604, 10 Am. Rep. 654; *Everman v. Hyman*, 26 Ind. App. 165, 84 Am. St. Rep. 283, 28 N. E. 1022. For contrary authority, see the note to *Hayden v. Souger*, 26 Am. Rep. 6, 7.

CRANE v. EDDY.

[191 Ill. 645, 61 N. E. 481.]

BROKER'S COMMISSION—DEFERRED PAYMENTS.—Where a real estate broker agrees to accept his commission in proportionate amounts, from time to time, as the deferred purchase money is paid, and default is made in payment of such purchase money and foreclosure had, he becomes at once entitled to commission upon the amount realized from the foreclosure sale, not in excess of the balance due him, and whether the property is bought in by his principal or sold to a stranger. (p. 286.)

A. J. Hopkins, F. G. Hanchett, Fred A. Dolp, and R. B. Scott, for the appellant.

Frank G. Plain, for the appellee.

647 PER CURIAM. In deciding this case on appeal from the circuit court of Kane county, the appellate court rendered the following opinion:

"This was a suit by Eddy against Crane to recover upon an instrument dated April 8, 1892, signed by Crane, the body of which was as follows: 'Due J. W. Eddy, or order, eight hundred fifty-four dollars and twenty-four cents as his commission on sale of my farm to A. Jernberg. The same to be paid out of the purchase money as ⁶⁴⁸ it is paid to me on the various payments, in proportionate amounts, with interest at six per cent per annum.' A suitable amended declaration was filed, the general issue was pleaded, and there was a stipulation defendant might prove all defenses thereunder. A jury was waived and the facts were agreed upon. The court rendered judgment for plaintiff for eight hundred and seventeen dollars and forty-two cents, and defendant appeals.

"Crane owned a farm and Eddy was a real estate broker. Prior to April 8, 1892, Eddy had been endeavoring to sell Crane's farm, and on that day he negotiated a sale thereof to A. Jernberg, and Crane deeded the premises to Jernberg. The amount of cash paid down is not shown, but for the deferred payments Jernberg executed five notes to Crane for different amounts, aggregating ten thousand three hundred and seventy-seven dollars, due at various dates from December 31, 1892, to May 10, 1896, with interest at six per cent per annum before and seven per cent after maturity, and secured said notes by a trust deed on the land to J. O. Curry, trustee. The instrument in suit evidences the agreement of Crane to pay Eddy commissions for making the sale. Jernberg paid the first two notes, aggregating two thousand three hundred and six dollars, and interest, and Crane released portions of the land from the trust deed. Jernberg failed to pay the last three notes when due, but became insolvent. Crane and Curry filed a bill to foreclose the trust deed, and obtained a decree finding due Crane on said notes nine thousand one hundred and seventy-eight dollars and fifty-eight cents, and directing the sale of the part not released. Pursuant to that decree the master in chancery advertised for sale that part of the farm not released, and at that sale Crane bid in the premises for nine thousand six hundred and five dollars and sixty cents, being the amount found due him by the decree and interest thereon, and costs and solicitor's fees. The amount due Crane at the time of that sale was nine thousand two hundred and thirty dollars and eighty-five cents, and he

did not pay that sum in cash to the master and receive it back from the master, but, instead, executed and delivered to the master a receipt for the last-named sum, in satisfaction of the debt and interest due him under the decree. The sale was confirmed. When ⁶⁴⁹ Jernberg paid the first two notes, Crane made proportionate payments to Eddy on the instrument in suit, and they were indorsed on the back thereof, the total of four payments so indorsed being three hundred and seven dollars and two cents. After the foreclosure sale was approved Eddy demanded of Crane payment of the balance of the sum specified in said instrument, but Crane refused to pay.

"If anyone else had bought at the master's sale and paid the money to the master, and the master had paid Crane the full amount of the decree in cash, it is clear that Crane would then have become liable to pay Eddy the balance unpaid upon the instrument here in suit, for the reason that he would thereby have collected all his purchase money in one of the ways provided for when the farm was sold. If Jernberg or any other person entitled had redeemed from the sale, clearly Crane would have been liable to Eddy for the balance unpaid upon this instrument. We fail to see why the fact that Crane chose to bid for the farm the full amount of the purchase money remaining unpaid, and the costs, and that no one raised his bid and no one redeemed from the sale, should produce a different result as to Crane's liability upon the instrument sued upon. Jernberg's notes and the purchase money debt they evidenced are fully paid, satisfied, and discharged by the decree and sale to Crane. They have been satisfied in one of the ways Crane and Jernberg contracted they might be discharged.

"Again, there is no claim the farm is not worth all Crane bid for it. Suppose, instead of bidding the full amount due himself, he had let others bid, and if no bid was made let the sale be continued till another date. It cannot be assumed no one else would have offered a bid. If some one had bid a thousand dollars less and the sale had been effected, then, upon Crane's recovering nearly the entire amount due him, Eddy would be entitled to a proportionate amount of his commissions, leaving a small part only of his commissions not yet due, because a ⁶⁵⁰ small part of the purchase money was still uncollected. Because Crane did not let strangers get the farm at something less than the full amount remaining unpaid, but to protect himself bid the full amount and no one cared to bid

more, is that precaution by Crane to defeat Eddy entirely? To state the proposition seems to us to show it cannot be just.

"There is another consideration arising from the record before us which appears decisive against Crane. When Jernberg paid the first two notes Crane caused the trustee to release part of the lands from the lien of the trust deed. It is not shown there was any provision in the trust deed that part of the land should be released when part payment was made, nor is it shown that Eddy consented to the release. All the land was security for each part of the debt. It may well be that if Crane had not released part of it the entire farm would have sold at master's sale to a stranger for the full amount due, and Crane would have received payment in full in money. If no one would bid for the unreleased lands more than the entire amount remaining unpaid, that should not be permitted to injure Eddy, who is not shown to be responsible for, or consenting to, the release. We are of opinion that this case should be treated the same as if any other person had bid and paid the same amount; that the debt for the purchase money having been paid and discharged in one of the ways provided by the contract between the parties, Eddy is entitled to his pay."

The appellate court, in allowing the appeal, granted a certificate of importance.

After a careful consideration of this case we have arrived at the same conclusion as that reached by the appellate court, and are satisfied with the reasons given in the opinion of that court for the affirmance of the judgment of the circuit court. We therefore adopt that opinion as the opinion of this court, and affirm the judgment.

A Real Estate Broker is Entitled to His Commission for making a sale, though it afterward transpires that the purchaser is unable to meet deferred payments as they become due: Wray v. Carpenter, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248.

BOARD OF TRADE TELEGRAPH COMPANY v. DARST.

[192 Ill. 47, 61 N. E. 898.]

EMINENT DOMAIN—DAMAGES.—DIMINUTION IN VALUE OF LAND by the construction of a telegraph line through it, although along the public highway in which the owner of the land holds only the fee subject to the public easement, is a proper element of damage in condemnation proceedings. (p. 290.)

EMINENT DOMAIN—ELEMENTS OF DAMAGE.—If a telegraph line is constructed along a public highway, the abutting owner may show, as elements of damage in condemnation proceedings, the nearness of the poles and structures to his residence, the unsightliness thereof, that it would be more work to cut weeds and grass around the poles, and would render the use of his land inconvenient or dangerous; but the mere possibility that animals might be injured furnishes no ground for the assessment of damages. (p. 290.)

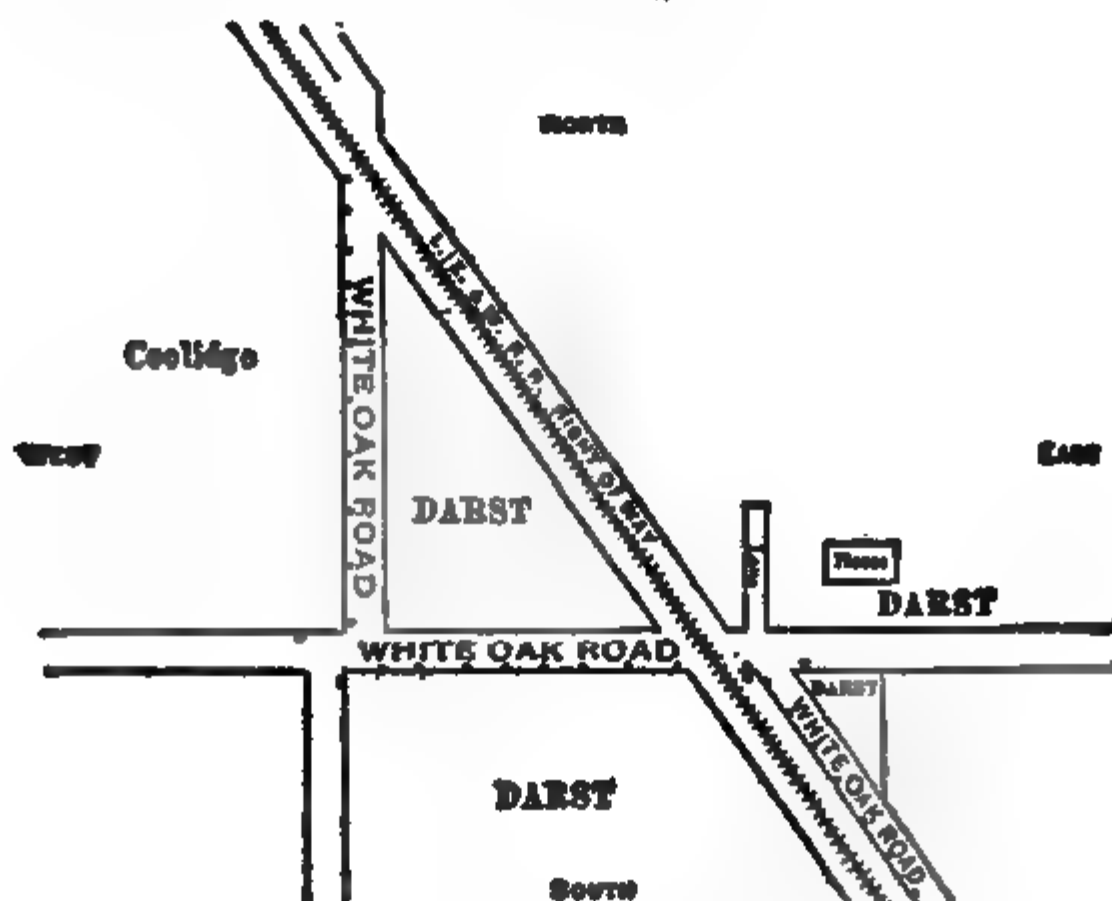
EMINENT DOMAIN—DAMAGES—SPECULATIVE ELEMENTS.—That the location of a telegraph line rendered it necessary for a land owner to build a board fence for the protection of his stock may be proved as an element of damages in condemnation proceedings, but the cost of the renewal of such fence every ten years for a hundred years is too speculative to be considered. (p. 290.)

Loesch Brothers and Howell, Young & Potter, for the appellant.

H. Hart, for the appellee.

⁴⁷ **CARTER, J.** The appellant filed its petition in the court below against the appellee to condemn a right of way for its telegraph line over so much of a strip six feet in width of one side of a public highway as should be necessary for its poles and wires. The highway was called "White Oak road," and passes through appellee's farm, the title to which strip belonged to appellee in fee, subject to the ⁴⁸ easement in the public. The farm contained one hundred and twenty-six acres, and was of the value of about one hundred and twenty-five dollars per acre. It was divided by the White Oak road and also by the Lake Erie and Western railroad. There were twenty-six poles and four braces placed on the public road through appellee's land, beside cross-beams and wires. The poles were one foot in diameter, and were set in the ground five feet and extended above the ground twenty feet. Their location on the public highway (indicated by dots), and the location of the

railroad with reference to appellee's land and his residence thereon, are shown by the following plat:



The appellee filed a cross-petition, claiming damages also to his land not taken. Upon the second trial the jury assessed appellee's damages for land taken at thirty-five dollars and to land not taken at three hundred dollars. Appellee remitted thirty-four dollars of the damages for land taken, and judgment was rendered on the verdict for the balance. This appeal was then taken by the telegraph company.

About the same number of witnesses testified on behalf of each party—those for the petitioner to the effect ⁴⁹ that appellee's land was not diminished in value by the construction of the telegraph line along the public highway, and those for appellee that the farm was diminished in value from three hundred dollars to five hundred dollars. The appellee, on his own behalf, testified that the land taken was worth thirty-five dollars, and that the land not taken was damaged or diminished in value five hundred dollars, but as he remitted all of the thirty-five dollars as assessed by the jury for land taken except for one dollar, only the amount of the damages assessed for injury to land not taken is now in controversy.

The grounds stated by appellee and other witnesses in his behalf upon which they estimated the damages to land not

taken were that one of the poles was located in front of his house, about two hundred feet away, on the opposite side of the public highway near his gate and others at intervals of one hundred and fifty feet; that they were unsightly; that he bought and occupied the farm for a home, and that it was damaged by the unsightliness of the poles; that by reason of the location of the poles it required more labor to keep the road clear of weeds, by making it necessary to use a scythe instead of a mower; also, that it rendered that part of the highway passing through his premises inconvenient and dangerous for his use in using the place as a stock farm, the poles having been set so near the barbwire fence that cattle and other animals would crowd between and be injured; that he would for that reason be compelled to put in and maintain a board fence instead of a wire fence, at an increased cost of thirty-nine dollars every ten years for the sixty rods. On the theory that such fence would have to be renewed every ten years for one hundred years, he estimated this element of his damages at three hundred and ninety dollars. It is plain, we think, that such an estimate was based upon mere theory, and upon suppositions entirely too remote and speculative to constitute any proper basis for a verdict or judgment. It was certainly proper for appellee to prove that his farm was lessened in value by the construction ⁵⁰ of the telegraph line through it, although along the public highway, in which he owned only the fee subject to the public easement. We have no doubt, as a proper element of damage, it was competent to prove the nearness to his residence and the unsightliness of the poles or structure; that it would require more labor and expense in cutting weeds and grass around these poles on his premises, and would render the use of the farm inconvenient or dangerous; but the mere possibility that injuries might be caused would furnish no ground for the assessment of damages. As said in *Jones v. Chicago etc. R. R. Co.*, 68 Ill. 380: "Investigations like this necessarily embrace a wide range of subjects, and it is hardly practicable to state any inflexible rule for estimating the damages to the land owner. The amount allowed should be sufficient to cover all the actual damage occasioned by reason of the construction of the road, for the land taken, for all physical injuries to the residue, and for all inconveniences of every character actually produced, but nothing should be allowed for imaginary or speculative damages, or such remote or inappreciable damages as the imagination may conjure up and which may or may not occur in all the future."

We think it was proper to prove that in locating the line as it was it became necessary for the appellee to build a board fence for the protection of his stock, but it was clearly too remote and speculative, and therefore error, to prove what it would cost to renew such fence every ten years for a hundred years. The appellant, by changing the location of its poles within the right of way, might obviate the danger apprehended and make such cost wholly unnecessary, or for other causes such renewals might never be made or become necessary. Moreover, the question was what was the damage to the land, and not what should be allowed to appellee for future fencing. Nothing could be allowed, under the cross-petition, for fencing, as such, and proof of the necessity ⁵¹ of such fencing, and of its cost, would be proper only as a means of showing the depreciation of the value of the land by reason of the taking and use of parts of it by appellant: Lewis on Eminent Domain, sec. 498.

We are satisfied, also, aside from this error in the admission of testimony, that it was error to overrule appellant's motion for a new trial on the ground that the damages were excessive. There is no sufficient evidence to support a verdict assessing three hundred dollars as damages, under the cross-petition, to the land not taken. The poles were all located in the public highway, and it is apparent from the evidence that a much less sum would have fully compensated the appellee. The law allows just compensation only.

The judgment is reversed and the cause remanded.

ELEMENTS OF DAMAGES ALLOWABLE IN PROCEEDINGS IN THE EXERCISE OF THE POWER OF EMINENT DOMAIN.*

- I. Elements of Damages for the Property Actually Taken.**
 - a. Classification.
 - b. General Rule for Determining the Damage for the Property Taken.
 - c. Special Estates Diminishing or Enhancing Value.
 - d. The Quality of the Land Taken.
 - e. Mines and Quarries on the Land.
 - f. Improvements.
 - g. Injury to, or Cost of Removing, Buildings.
 - h. Rental Value.
 - i. Adaptability of Property Taken for a Special Purpose.
 - j. Incidental Damage Resulting to Personal Property.

***REFERENCES TO MONOGRAPHIC NOTES.**

Eminent Domain—Compensation for property taken in the exercise of the right of, generally: 88 Am. Dec. 112-121; 19 Am. St. Rep. 458-460; 22 Am. St. Rep. 49-52.

1. Loss of, or Damage to, Growing Crops.
2. Cost of Removing Personal Property.
3. Loss of, or Injury to, Business.

II. Elements of Damage Other than the Loss of the Property Taken.

- a. Damage to a Tract of Land Entirely Disconnected from that Actually Taken.
- b. Injury to Riparian Rights.
- c. Flowage or Overflow.
- d. Loss of Right of Lateral Support.
- e. Cost of Fencing.
 1. Of Highways.
 2. Of Right of Way of Railways.
- f. Cost of Crossings, Gates, or Cattle-guards.
- g. Matters Causing Inconvenience in the Use of Land.
- h. Danger from Fire.
 1. Danger to Animals.
- j. Noise, Smoke, Cinders, Vapors, etc.
- k. Obstruction to Ingress or Egress.
 1. Proximity of a Railroad or Other Structure.
- m. Depreciation in Value of Property not Taken.
- n. Miscellaneous Elements of Damage.

I. Elements of Damage for the Property Actually Taken.

a. **Classification.**—It is evident that when lands are taken in the exercise of the right of eminent domain their owner must be damaged: 1. Because of what is actually taken from him in whole or in part, whether it consists of the realty taken or of personal property so situated that it must be lost or its value directly lessened to the owner by the loss of his real estate; and 2. The loss suffered by him in connection with other property, whether real or personal, not directly resulting from, but necessarily incident to, the loss of the property taken, or of its appropriation to some use which exposes him to inconvenience or other loss. It sometimes happens that the property sought to be appropriated in the exercise of the right of eminent domain is the only property belonging to the person who is to be compensated for the taking, and we shall first consider what are the elements of damage when such is the case. After disposing of this question, we shall next consider the case of one who has property in addition to that appropriated to the public use, and seek to ascertain and state what are the elements of damages for which he is entitled to recover besides being compensated for the property directly taken.

b. **The General Rule for Determining the Damage for the Property Taken** is perhaps more clearly and accurately stated in section 408 of Lewis on Eminent Domain than elsewhere. That author there says: "In estimating the value of property taken for

public use, it is the market value of the property which ought to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. In estimating its value, all the capabilities of the property and all the uses to which it can be applied, or for which it is adapted, are to be considered, and not merely the condition in which it is at the time and the use to which it is applied by the owner." Approved in *McKinney v. Nashville*, 102 Tenn. 131, 73 Am. St. Rep. 859, 52 S. W. 781. Perhaps no single phrase can give a better idea of the compensation to which the land owner is entitled than to say that it is to be measured by its market value: *Santa Ana v. Brunner*, 132 Cal. 234, 64 Pac. 287; *Wabash etc. R. Co. v. McDougal*, 118 Ill. 229, 8 N. E. 678; *Central B. Co. v. Lowell*, 15 Gray, 106; *United States v. Inlota*, Fed. Cas. No. 15,441. The phrase is, nevertheless, somewhat misleading, because it conveys the impression of the necessity of the existence of, and resort to, a market, and of awarding only what would be realized if it were resorted to. In the first place, it is clear that the owner is not obliged to accept a price such as would be realized by a forced sale or a sudden attempt to force the market: *Somerville etc. R. Co. v. Doughty*, 22 N. J. L. 495; but rather to demand such a price as he might secure after ample time, and upon such terms as to credit as are usually offered by persons who are under no necessity of sacrificing their property: *Little Rock etc. Ry. v. Woodruff*, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792. In truth, the market value, strictly speaking, must often be an inaccurate or impossible test. What the owner is entitled to is the true value of his property to be ascertained by applying all reasonable tests and considering all the varied elements of value, or, in other words, all the facts which would naturally influence persons desiring to purchase: *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681; under circumstances that are not special or extraordinary, and do not unduly urge the vendor to sell or the purchaser to buy: *Kiernan v. Chicago etc. R. Co.*, 123 Ill. 188, 14 N. E. 18; *Calumet R. R. Co. v. Moore*, 124 Ill. 329, 15 N. E. 764; *Brown v. Calumet R. R. Co.*, 125 Ill. 600, 18 N. E. 283; *Tedens v. Sanitary Dist.*, 149 Ill. 87, 86 N. E. 1033; *Kansas City R. Co. v. Fisher*, 49 Kan. 17, 30 Pac. 111; *Cochrane v. Commonwealth*, 175 Mass. 299, 56 N. E. 610, 78 Am. St. Rep. 491; *Pittsburgh etc. R. Co. v. Vance*, 115 Pa. St. 325, 8 Atl. 764.

c. **Special Estates Diminishing or Enhancing Value.**—The owner is to be compensated for all the loss suffered by him, and this may be enhanced or diminished by his interest in the property being less than the fee or the whole title, or by his having connected with it some right not ordinarily possessed by the owner of the

fee, making the property more valuable, and its loss therefore greater. Often the right acquired by the exercise of the power of eminent domain is a mere easement, as where lands are taken for a public highway, the title to the fee remaining in the owner. Such title does not, however, leave him a right to use his lands for any purpose of any appreciable or considerable value, and hence the amount of compensation which should be awarded him is not lessened by his retention of the fee: *Fayetteville etc. Co. v. Combs*, 51 Ark. 324, 11 S. W. 418. If, on the other hand, the property taken is already subject to an easement, the existence of that easement must be considered in determining what compensation should be made for the further taking. It may be that the imposition of the additional servitude will cause no additional loss or injury to the owner of the property, in which case the compensation to be awarded him must, at most, be nominal only: *Burkam v. Ohio etc. Ry.*, 122 Ind. 344, 23 N. E. 799; *Stetson v. Bangor*, 73 Me. 357; *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276; *In re One Hundred and Seventy-third Street*, 78 Hun, 487, 29 N. Y. Supp. 205; *In re One Hundred and Sixteenth Street*, 1 App. Div. 436, 37 N. Y. Supp. 508; but if a substantially additional servitude is imposed or one from which the land owner must suffer greater annoyance, compensation must be awarded in proportion to his additional injury: *Stockton etc. Road Co. v. Stockton C. R. R. Co.*, 53 Cal. 11; *Laing v. United etc. C. Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682, 25 Atl. 409. If, however, the servitude or other right to which the lands were subject is such that their owner may, consistent with its existence, still apply them to some valuable use, and they are to be subjected to a further right, destroying or impairing the right which he retained, or the use which he might lawfully make notwithstanding the first easement, he must be compensated for the additional loss to which he will be subjected in the further appropriation of his property: *Ellsworth v. Chicago etc. Ry. Co.*, 91 Iowa, 386, 59 N. W. 78; *Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. 585; *Dodson v. Cincinnati*, 34 Ohio St. 276. So the owner of the land may have other estates so inseparable from, or intimately connected with, it, that justice cannot be done without awarding him compensation in excess of the mere value of the land. It may be already devoted to a public use in aid of which large expenses have been incurred, as where it is part of the right of way of an existing railroad, in which event the loss of the value of the land may be but a small portion of the damages suffered, and the making of compensation must include an allowance for the additional expenses to which the corporation must be put in the ordinary use of its road, or in supplying improvements and appliances which have been destroyed or impaired through the exercise of the power of eminent domain: *Metropolitan R. R. Co. v. Quincy R. R. Co.*, 12 Allen, 262; *Toledo*

etc. R. Co. v. Detroit etc. R. Co., 62 Mich. 564, 4 Am. St. Rep. 875, 29 N. W. 500; Grand Rapids v. Grand Rapids R. Co., 66 Mich. 42, 33 N. W. 15; Bridgman v. Hardwick, 67 Vt. 653, 32 Atl. 502. If condemnation proceedings should be prosecuted to condemn to a new public use lands already used as a toll-road, compensation may not be computed without including an award for the loss to result from the consequent termination of the right to take tolls: In re Sunderland Bridge, 122 Mass. 459; Montgomery County v. Schuylkill B. Co., 110 Pa. St. 54, 20 Atl. 407; Clarion etc. Co. v. Clarion County, 172 Pa. St. 243, 33 Atl. 580.

d. The Quality of the Land must be taken into consideration as an element of the damages: Ragan v. Kansas City etc. R. R. Co., 144 Mo. 623, 46 S. W. 602; and in estimating the value of the land taken, the jury may take into consideration its productiveness or the income which might have been derived from it, if it had not been taken: Weyer v. Chicago etc. R. R. Co., 68 Wis. 180, 31 N. W. 710.

e. Mines and Quarries on the Land.—If the land contains deposits of valuable mineral, that fact must be taken into consideration in estimating its market value: Twin Lakes etc. Min. Co. v. Colorado etc. Ry. Co., 16 Colo. 1, 27 Pac. 258; Doud v. Mason City etc. Ry. Co., 76 Iowa, 438, 41 N. W. 65; Northern Pacific etc. Ry. Co. v. Forbis, 15 Mont. 452, 48 Am. St. Rep. 692, 39 Pac. 571. Or if the land has a mine under its surface, that fact may be considered as an element of damage, if the mine adds to the market value of the land, although such mine has never been worked: Haslam v. Galena etc. R. R. Co., 64 Ill. 353. If there is a stone quarry upon the right of way which will be destroyed by reason of the grading and roadbed, its value is a proper element of damage to be considered by the jury: Burlington etc. R. R. Co. v. White, 28 Neb. 166, 44 N. W. 95; and the same is true if the land contains a gravel-pit: Cameron v. Chicago etc. R. R. Co., 51 Minn. 160, 53 N. W. 199.

f. Improvements.—The value of improvements made upon land and injured or destroyed by the taking of the land must be considered as an element of damage, and in estimating the diminished value of the property arising from such taking for a public use: Beale v. Boston, 166 Mass. 53, 43 N. E. 1029; Plank Road Co. v. Thomas, 20 Pa. St. 91. On the question of damages to land not taken for a right of way of a railroad, the value of such land with the improvements upon it after the construction of the road across the tract is properly considered in estimating the damages: Chicago etc. Ry. Co. v. Eaton, 136 Ill. 9, 26 N. E. 575. The question of the cost of erecting such improvements as were upon the premises taken is not an element of damage, unless it is shown that they would actually increase the value of the premises to the extent of

their cost. The true question is not what the property taken cost, but for how much would it sell: *Jacksonville etc. R. R. Co. v. Walsh*, 106 Ill. 253. In an action to condemn a right of way for a railroad commenced after the construction of the road, the land owner is not entitled to be paid the value of improvements placed upon the land by the railroad company or its predecessor in interest before the commencement of the condemnation proceedings: *San Francisco etc. R. R. Co. v. Taylor*, 86 Cal. 246, 24 Pac. 1027.

g. Injury to or Cost of Removing Buildings or personalty from land condemned under proceedings in eminent domain is not generally an element of damage to be compensated for. Buildings on the land taken must be considered as part of the realty, and paid for as such in estimating the market value of the property, and the cost of their removal by the owner of the land is not an element of damage, which may be recovered by him: *Kansas v. Morse*, 105 Mo. 510, 16 S. W. 893; *St. Louis etc. R. R. Co. v. Knapp etc. Co.*, 160 Mo. 396, 61 S. W. 800; *Finn v. Providence etc. Co.*, 99 Pa. St. 631; *Grugan v. Philadelphia*, 158 Pa. St. 337, 27 Atl. 1000. In *Metropolitan West Side etc. R. R. Co. v. Siegel*, 161 Ill. 638, 44 N. E. 276, the court was of opinion that the cost of the removal of a large manufacturing plant from land of low value may constitute an element of damage in condemnation proceedings, when the value of the land alone will not pay for such removal. The costs of the removal of a structure from land taken for a highway, and the diminution in value of such structure by reason of such removal, have been allowed as an element in the estimation of damages: *Ford v. County Commrs.*, 64 Me. 408; *White v. Foxborough*, 151 Mass. 28, 23 N. E. 652. And so the cost of removing a hedge from land taken for a highway has been considered as an element of damage to be paid for: *Board of Commrs. v. Beckwith*, 10 Kan. 603.

h. Rental Value.—In estimating the value of real estate taken under proceedings in eminent domain, the depreciation in its rental value may be taken into consideration as an element of the damages: *Schroeder v. De Graff*, 28 Minn. 299, 9 N. W. 857; *Fremont etc. R. R. Co. v. Bates*, 40 Neb. 381, 58 N. W. 959; *Chicago etc. Ry. Co. v. Sturey*, 55 Neb. 137, 75 N. W. 557. If the injury is to a leasehold interest by the opening of a street through leased land, the jury may consider the probability of a renewal of plaintiff's term, where the evidence shows that this circumstance increased its market value: *Mayor of Baltimore v. Rice*, 73 Md. 307, 21 Atl. 181. If land held under a leasehold interest is appropriated for a right of way by a railroad, the tenant's measure of damage is the difference between the value of the leasehold at the time of the appropriation and its diminished value due to such appropriation: *Seattle etc. Ry. Co. v. Scheike*, 3 Wash. 625, 29 Pac. 217, 30 Pac.

508. In determining damages to be awarded to the lessee when part of the demised premises is to be taken in the exercise of the right of eminent domain, he should be compensated for the diminution in value of the property to him during his term without taking into consideration the fact that he has not yet paid his rent for such term: *Gluck v. Mayor of Baltimore*, 81 Md. 315, 48 Am. St. Rep. 515, 32 Atl. 515. Loss of rent, however, by reason of obstructions to access to a building upon abutting property during the construction of a bridge and its approaches is a burden incidentally imposed upon such property, and cannot be recovered as an element of damage: *Osgood v. Chicago*, 154 Ill. 194, 41 N. E. 40.

1. Adaptability of Property Taken for a Special Purpose affecting its value may be considered by the jury as an element of damage for the taking. Thus, the fact that a lot is rendered less valuable for the particular business for which the owner is using it by reason of a right of way taken in front of it by a railroad company may be considered in estimating the damages: *Muller v. Southern Pac. Branch Ry. Co.*, 83 Cal. 240, 23 Pac. 265. If land sought to be taken in the exercise of the right of eminent domain can be used for two or more purposes which do not interfere with each other, and is valuable for each purpose, its value for both may be proved, and the court cannot compel the owner to elect upon which of these purposes he will rely in seeking to show damages which should be awarded to him: *Northern Pacific etc. Ry. Co. v. Forbis*, 15 Mont. 452, 48 Am. St. Rep. 692, 39 Pac. 571. In estimating the compensation to which the land owner is entitled on the taking of his property for a public use, the adaptability of the property in its present state and surroundings for other and more valuable purposes than those to which it has been put is a proper element to be considered in determining its market value, but its value under nonexisting conditions, which the owner may intend to create, cannot be considered: *Five Tracts of Land v. United States*, 101 Fed. 661. If the land has a peculiar value for certain determinate purposes, even though it is not then used for any of such purposes, and no one intends at the time to so use it, its adaptability to such purposes, or to any of them, forms an element of damage to which the owner is entitled for its taking: *Louisville etc. R. R. Co. v. Ryan*, 64 Miss. 399, 8 South. 173. In estimating the value of a lot before the taking, its possible and probable uses are important elements: *Lafin v. Chicago etc. R. R. Co.*, 33 Fed. 415. Thus the availability for improvements is an element of its value: *Harris v. Schuylkill etc. R. R. Co.*, 141 Pa. St. 242, 23 Am. St. Rep. 278, 21 Atl. 590. The availability of the property for use in connection with the purpose for which it is taken must be considered: *Matter of Gilroy*, 85 Hun, 424, 32 N. Y. Supp. 891; or its availability for the purpose of being cut up into city lots forms an element of damage: *Warden v. Philadelphia*, 167 Pa. St. 523, 31 Atl. 928.

Among the special purposes for which property is valuable may properly be considered the purpose for which it is sought to be appropriated in the exercise of the power of eminent domain. Thus, if it is sought to be condemned for use as a reservoir or a boom, and it is the only tract in the neighborhood suitable for, or susceptible of, such use, or if not the only tract, it is at least better adapted therefor than any other, this must necessarily enhance its value, and cannot be excluded from consideration in determining the compensation to be awarded: *San Diego etc. Co. v. Neale*, 78 Cal. 63, 20 Pac. 372; *Boom Co. v. Patterson*, 98 U. S. 403. So, if it is established that a public park, state capitol, or other public improvement is to be located and constructed, and because of this fact the market value of certain lands has increased, such enhancement of value must be considered and allowed for in any proceeding to take and appropriate any of them to such public use: *Sanitary Dist. v. Loughran*, 160 Ill. 362, 43 N. E. 359; *In re Staten Island R. Co.*, 10 N. Y. St. Rep. 393; *In re Condemnation etc.*, 19 R. I. 382, 33 Atl. 523.

j. Incidental Damage Resulting to Personal Property.

1. **Loss of or Damage to Growing Crops.**—If growing crops are destroyed by the appropriation of a right of way and entry thereunder, the owner may prove the value of the crops as an element of damage: *Lance v. C. M. etc. R. R. Co.*, 57 Iowa, 636, 11 N. W. 612; *Penney v. Commonwealth*, 173 Mass. 507, 73 Am. St. Rep. 312, 53 N. E. 865; *Gilmore v. Pittsburgh etc. R. R. Co.*, 104 Pa. St. 275; *Seattle etc. Ry. Co. v. Scheike*, 3 Wash. 625, 29 Pac. 217, 30 Pac. 563. In an action to recover damages against a railroad company for a right of way, the injury done to growing crops, both inside and outside of the land appropriated, must be estimated in assessing damages: *Haislip v. Wilmington etc. R. R. Co.*, 102 N. C. 376, 8 S. E. 926. It has also been decided, however, that the destruction of a land owner's crop by reason of his fences being thrown down by the builders of railroad, and the cost and annoyance of keeping stock away from such crops are not proper elements of damage in a proceeding for condemnation of the right of way. They are an independent tort: *Springfield etc. Ry. Co. v. Henry*, 44 Ark. 360.

2. **Cost of Removing Personal Property.**—In proceedings to condemn land taken for public uses, the owner of the land should not be allowed damages for the cost of removing his personal property from the premises: *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 248; *Matter of New York Central R. R. Co.*, 35 Hun, 307; *Matter of New York etc. Ry. Co.*, 35 Hun, 633. As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to the removal of personalty and the surrender of the possession are not elements to be considered

in determining the damages to which the owner is entitled for land taken for a public use: *Raulet v. Concord R. R. Corp.*, 62 N. H. 561. In assessing damages for taking land for a public use, the cost of the removal of personalty stored thereon to a place less exposed to danger from fire caused by the construction of a railroad, has been awarded as an element of damage: *Colorado etc. Ry. Co. v. Brown*, 15 Colo. 193, 25 Pac. 87. In *Edmands v. Boston*, 108 Mass. 535, it was decided that in assessing damages for taking land to widen a street, injury to personal property is not to be considered. But injury to fixtures or trees or the like is a proper element of damage to be considered by the jury: *White v. Foxborough*, 151 Mass. 28, 23 N. E. 652.

8. Loss of, or Injury to, Business, or the goodwill thereof, is, as a general rule, not to be considered upon the inquiry as to the compensation to be awarded a person whose property is condemned and taken for a public use: *Edmands v. Boston*, 108 Mass. 535; *Virginia etc. R. R. Co. v. Henry*, 8 Nev. 165; *Matter of Department of Public Parks*, 53 Hun, 280, 6 N. Y. Supp. 750; *Harvey v. Lackawanna etc. R. R. Co.*, 47 Pa. St. 428; *Fuller v. Edings*, 11 Rich. 239. Probable loss of future business is not an element of damage: *Lake Shore etc. Ry. Co. v. Cincinnati etc. Ry. Co.*, 30 Ohio St. 604. The injury to be compensated for is that to the land, and not for such business in addition as may be carried on upon the land: *Shenandoah Valley R. R. Co. v. Shepherd*, 26 W. Va. 672. Nor can there be any recovery for an actual or supposed loss of profits in a business carried on upon the premises: *Jacksonville etc. R. R. Co. v. Walsh*, 106 Ill. 253; *Becker v. Philadelphia etc. R. R. Co.*, 177 Pa. St. 252, 35 Atl. 617; *Eddings v. Seabrook*, 12 Rich. 504. But it has been held, contrary to the above rule, that a land owner whose property is taken for a public use should be compensated for such loss as he is able to show he will suffer during the time his business will be interrupted by the construction of the work: *Grand Rapids etc. R. R. Co. v. Weiden*, 70 Mich. 395; *Commissioners v. Moesta*, 91 Mich. 150, 51 N. W. 903. See, also, *In re Gilroy*, 85 Hun, 424, 32 N. Y. Supp. 891; *In re City of Buffalo*, 1 N. Y. St. Rep. 742.

II. Elements of Damage Other than the Loss of the Property Taken.

a. Damage to a Tract of Land Entirely Disconnected from that Actually Taken cannot be awarded. It is obvious that the loss of the value of the land actually appropriated to a public use by no means measures the compensation which may properly be awarded therefor. The disconnecting it from the owner's other real property usually renders the ingress or egress to the latter more difficult, and often more dangerous, and diminishes its desirability, and hence its value in many other respects. That compensation for this additional damage must be allowed is undoubted, but one of

the most difficult questions in connection with the law of eminent domain relates to the determination of the extent to which injury to other property of the owner must be compensated. If he owns several parcels of realty in the same neighborhood, all may be injuriously affected by the taking, though but of one of them did the land taken constitute a part. But if compensation were awarded for all the lands belonging to an owner injuriously affected, it might happen that the wealth or additional holdings of each person whose lands were taken must be reckoned as one of the elements of damage to be considered, and that the amount finally awarded would be much greater when persons whose lands were actually taken were men of great wealth than when most of them had no landed interests other than that immediately affected by the proceeding. It is an established rule in proceedings for the condemnation of lands that the just compensation which the land owner is entitled to receive for his land and the damages thereto must be limited to the tract, a portion of which is actually taken: *Currie v. Waverly etc. R. R. Co.*, 52 N. J. L. 381, 19 Am. St. Rep. 452, and note, 458, 460, 20 Atl. 56. Distinct and disconnected properties are to be treated as separate parcels, and damages under condemnation proceedings must ordinarily be assessed on this principle. Separate parcels cannot be treated as one tract for the purpose of the assessment of damages for the taking of land in one only of such parcels, and any other injury thereto arising from such taking: *White v. Metropolitan etc. R. R. Co.*, 154 Ill. 620, 39 N. E. 270; *Wellington v. Boston etc. R. R.*, 164 Mass. 380, 41 N. E. 652; *Cameron v. Chicago etc. Ry. Co.*, 42 Minn. 75, 43 N. W. 785; *Potts v. Pennsylvania etc. R. R. Co.*, 119 Pa. St. 278, 4 Am. St. Rep. 646, 13 Atl. 291; *Gibson v. Bridge Co.*, 192 Pa. St. 55, 73 Am. St. Rep. 795, 43 Atl. 339. In order that two properties having no physical connection may be regarded as one, in the assessment of damages under condemnation proceedings, they must be so inseparably connected in the use to which they are applied as that the injury to or destruction of one must necessarily and permanently injure the other. If not so connected, the recovery of damages must be confined to the injuries to that property a portion of which is taken: *Leavenworth etc. Ry. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16; *Potts v. Pennsylvania etc. R. R. Co.*, 119 Pa. St. 278, 4 Am. St. Rep. 646, 13 Atl. 291. Distinct tracts of land connected only by means of a way, either private or public, cannot be treated as one for the assessment of damages inflicted under the exercise of the right of eminent domain: *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 151 Pa. St. 334, 31 Am. St. Rep. 762, 25 Atl. 107. But if half of a lot is condemned for a public purpose, the fact that it is separated from the other half by an alley does not prevent the owner being entitled to damages not only to the land taken, but for an injury to the entire lot, if it is in fact used as a whole:

Haggard v. Independent School Dist., 113 Iowa, 486, 85 N. W. 777. If two or more lots contiguous to each other are improved together as one property, and it is sought to appropriate one of them, the owner is entitled to compensation for the injury to the property as a whole: Cummins v. Des Moines etc. Ry. Co., 63 Iowa, 397, 19 N. W. 268; Kremer v. Chicago etc. Ry. Co., 51 Minn. 15, 38 Am. St. Rep. 468, 52 N. W. 977; Atchison etc. R. R. Co. v. Boerner, 84 Neb. 240, 33 Am. St. Rep. 637, 51 N. W. 842. The mere platting of land into blocks on a map does not so divide into separate lots as to limit the owner's damages to the value of a particular block, a small portion of which is actually taken: Currie v. Waverly etc. R. R. Co., 52 N. J. L. 381, 19 Am. St. Rep. 452, 20 Atl. 56; and the same rule applies to the minor government subdivisions of a farm over which a right of way of a railway is taken: Chicago etc. Ry. Co. v. Baker, 102 Mo. 553, 15 S. W. 64; Chicago etc. R. R. Co. v. Brunson, 43 Kan. 371, 23 Pac. 495.

b. Injury to Riparian Rights.—If land is taken under the exercise of the right of eminent domain, and injury thereby results to the riparian rights of the owner of the land, such injury forms an element of damage which must be paid for: Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. 96; Trenton Water Power Co. v. Roff, 36 N. J. L. 335; Bridgeman v. Hardwick, 67 Vt. 653, 32 Atl. 502. Thus, if a railroad company in constructing its road necessarily diverts a stream from its natural channel, it must either restore and preserve the stream in its former state of usefulness or compensate the riparian owner in damages: Cott v. Lewiston R. R. Co., 36 N. Y. 214. Or if a railroad company in taking land for a right of way has injured the water power of the owner, the jury may assess full damages for such injury as one of the elements in the diminution of the value of the land: Lake Superior etc. R. R. Co. v. Grieve, 17 Minn. 322; Dorian v. East Brandywine etc. R. R. Co., 46 Pa. St. 520. If a railroad right of way is condemned across flats appurtenant to a wharf, to the injury of the latter, the amount of such injury is an element of damage: Ashby v. Eastern R. R. Co., 5 Met. 368, 38 Am. Dec. 426. The owner of several lots fronting on a navigable river who is accustomed to use his river front in hitching logs, putting in rafts and shipping lumber, is entitled to recover, as one of his elements of damage, any injury to his riparian rights arising from the construction of a bridge and embankment by a railroad upon its condemned right of way: Chapman v. Oshkosh etc. R. R. Co., 33 Wis. 629. If a railway in constructing its road through a navigable lake thereby cuts off the riparian owner from access to the lake, and leaves in front of his land a pool of stagnant water, the owner is entitled to recover for such injury as an element of his damage: Delaplaine v. Chicago etc. Ry. Co., 42 Wis. 214, 24 Am. Rep. 386.

c. **Flowage or Overflow.**—If a right of flowage is injuriously affected by the construction of a railroad, the owner is entitled to recover therefor: *Kankakee etc. R. R. Co. v. Horan*, 22 Ill. App. 145; *Davidson v. Boston etc. R. R.*, 3 Cush. 91. Or if, by the construction of the roadbed and ditches, the surface water is diverted from its usual and ordinary course, and by means of embankments or ditches is conveyed to any particular place, and thereby overflows land not subject to overflow before, such injury must be considered as an element of damage: *Springfield etc. Ry. Co. v. Henry*, 44 Ark. 360; *Newgass v. Railway Co.*, 54 Ark. 140, 15 S. W. 188; *Walker v. Old Colony etc. Ry. Co.*, 103 Mass. 10, 4 Am. Rep. 509; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308. If, in the preservation of a highway, water is diverted from one part of the land of an owner and thrown upon another part thereof in such a way as to overflow it and change the condition of his land, this is a taking, and the changed condition of the land owing to such overflow is an element of damage: *Smith v. Gould*, 61 Wis. 81, 20 N. W. 869. If a municipality, by means of a basin and culvert, discharges all the surface water carried to a particular point in such manner that the water, by its own force, makes a channel through the land of a private owner, a taking of private property for a public use occurs, for which compensation must be made: *Miller v. Mayor of Morristown*, 47 N. J. Eq. 62, 20 Atl. 61. And if the proper construction of a railroad will pond water upon defendant's adjacent land, the overflow is a proper subject to be considered in estimating damages: *Oregon etc. R. R. Co. v. Barlow*, 8 Or. 811. If a municipality obstructs or arrests the natural flow of surface water in constructing and maintaining a public work, and causes such water to flow upon adjacent land to the diminution of its market value, the owner may recover compensation for such damage under a constitutional provision declaring that private property shall not be taken or damaged for a public use without just and adequate compensation being first made: *Mayor of Albany v. Sikes*, 94 Ga. 30, 47 Am. St. Rep. 132, 20 S. E. 257. If, in the construction of a railroad, the flow of surface water is stopped, forming stagnant pools along the side of or on the right of way, to the injury of an adjacent farm, this is an element of damage to the farm owner, proper to go to the jury: *Wichita etc. R. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. 75. Or if the construction of a railroad across a farm lessens its value by preventing the flow of surface water from one part of the farm to another, this is a proper element to be taken into consideration in fixing the amount of compensation to which the owner is entitled: *Pflegar v. Hastings etc. R. R. Co.*, 28 Minn. 510, 11 N. W. 72. The flooding of land with sewage, or the discharge of sewage into a stream passing through the land, so as to effectually impair its usefulness, must be taken into consideration when the land is condemned, and a sewer

constructed through it: *Joplin Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406; *Winn v. Rutland*, 52 Vt. 481. If land is to be actually invaded and injured by superinduced additions of water, earth, sand, or other material, by having any artificial structure placed upon for a public use, so as to effectually destroy or impair its usefulness, such destructive elements must be considered in estimating the damages for the taking: *Mayor of Cumberland v. Willison*, 50 Md. 138, 33 Am. Rep. 304. In assessing damages in condemnation proceedings for lands taken for canal, ditch, or reservoir purposes, damages likely to result from seepage or leaking should be considered by the jury: *Denver City Water Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565. If a well on land condemned for public purposes is destroyed in the construction of the work, the owner is entitled to recover therefor as an element of his damage: *United States v. Alexander*, 148 U. S. 186, 13 Sup. Ct. Rep. 529; *Trowbridge v. Inhabitants of Brookline*, 144 Mass. 139, 10 N. E. 796; *Penny v. Commonwealth*, 173 Mass. 507, 73 Am. St. Rep. 312, 53 N. E. 865; *Bickford v. Hyde Park*, 173 Mass. 552, 73 Am. St. Rep. 320, 54 N. E. 343.

d. **Loss of Right of Lateral Support and the injurious effect upon it by the construction of the work upon the tract over which the right of eminent domain is exercised, is an element for consideration in the ascertainment of the compensation to which the land owner is entitled:** *Davis v. Jefferson Gas Co.*, 147 Pa. St. 130, 23 Atl. 218. The removal by excavating by a railroad company in constructing its road of the lateral support to the soil adjoining its right of way is a taking which must be considered in making compensation to the land owner for the right of way taken: *McCullough v. St. Paul etc. Ry. Co.*, 52 Minn. 12, 53 N. W. 802. Thus, the damage to be recovered for the laying out of a highway below the level of the land owner's adjoining house and land is not confined simply to the injury caused to the right of lateral support for the soil exclusive of the building, but includes all the damage to the property, such as costs incurred in fitting the property to the changed conditions: *Hartshorn v. County of Worcester*, 113 Mass. 111. In estimating damages sustained by laying out highways, the owner of part of a building can recover for the loss of support caused by removing from the location of the highway the part of the building which he does not own: *Marsden v. Cambridge*, 114 Mass. 490.

If the establishment and operation of a structure on land condemned and taken renders the construction of a retaining wall necessary to the safety of the land owner's remaining land, he may recover the cost of such retaining wall as a part of his damages: *Manson v. Boston*, 163 Mass. 479, 40 N. E. 850; *Taylor v. Kansas City etc. Ry. Co.*, 38 Mo. App. 668; *Thompson v. Milwaukee etc. Co.*, 27 Wis. 93.

a. Cost of Fencing.

1. Of Highways.—In estimating the amount of damages for the taking of land for highway purposes, the expense of building additional fences should be taken into consideration, and forms a proper element of damage: *Watson v. Crowsore*, 93 Ind. 220; *Barrell v. Quick* (Ky.), 63 S. W. 33; *Jones v. Barclay*, 2 J. J. Marsh. 76; *Van Bentham v. Board of Commrs.*, 49 Kan. 30, 30 Pac. 111; *Stone v. Inhabitants of Heath*, 135 Mass. 561; *White v. Inhabitants of Foxborough*, 151 Mass. 28, 23 N. E. 632; *Petition of Road Co.*, 35 N. H. 134; *Inhabitants v. Dilley*, 24 N. J. L. 209; *Schuler v. Board of Supervisors*, 12 S. Dak. 460, 81 N. W. 890. If it appears that a necessity of fencing land will arise from the construction of the road, the cost of fencing is an element of damage, although the law applicable to the locality may not require the construction of a fence: *Butte Co. v. Boydston*, 64 Cal. 111, 29 Pac. 511; and though the value of the land is not enhanced by the laying out of the road over it, the owner is entitled to the cost of fences necessitated by it: *Anderson v. Wharton Co.* (Tex. Civ. App.), 65 S. W. 643. If a highway is laid out along the side of a farm, taking no portion of the land of the owner, he is not entitled to recover the expense of fencing his land adjacent to such highway: *People v. Supervisors*, 19 Wend. 102. If a street or highway is not required by law to be fenced, the property owner through whose land one is opened is not charged with the duty of fencing, and without a showing of the necessity of a fence, the condemnation jury is not warranted in allowing the expense of such fencing as an item of damages: *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. 986. In *Hanrahan v. Fox*, 47 Iowa, 102, the court was of opinion that the owner of land through which a highway is established is not entitled to recover the cost of constructing a necessary fence as an item of damage, although the fact that his land is thereby left open and unfenced may be considered in arriving at the depreciated value of the remaining premises.

2. Of Right of Way of Railways.—It is a general rule that the cost of additional fencing made necessary by the building of a railroad is a proper element of damage to be considered and allowed in making compensation for the right of way: *Texas etc. Ry. Co. v. Cella*, 42 Ark. 528; *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 74; *California etc. R. R. Co. v. Southern Pacific R. R. Co.*, 67 Cal. 59, 7 Pac. 123; *Evansville etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 121; *Atcheson etc. R. R. Co. v. Gough*, 29 Kan. 94; *Street v. New Orleans etc. R. R. Co.*, 43 La. Ann. 116, 9 South. 15; *Winona etc. R. R. Co. v. Denman*, 10 Minn. 207; *New York etc. Ry. Co. v. Stanley*, 35 N. J. Eq. 283; *Watson v. Pittsburgh etc. R. R. Co.*, 37 Pa. St. 469; *Pittsburgh etc. Ry. Co. v. Vance*, 115 Pa. St. 325, 8 Atl. 764; *Greenville etc. R. R. Co. v. Pontlow*, 5 Rich. 428. The additional

cost to the owner of the land taken for a railroad for fencing along the line is always a proper element of damage if the company is under no obligation to fence its road: *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100. But it has been determined that it can be considered in so far as it depreciates the market value of the property: *Curtin v. Nittany etc. R. R. Co.*, 135 Pa. St. 20, 19 Atl. 740; and not as a distinct item of damage: *Seattle etc. Ry. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720. If the railway company is compelled by statute to construct and maintain fences along its right of way, the additional cost of such fences cannot be considered as an element of damage to the land owner: *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100; *St. Joseph etc. R. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Sedalia etc. Ry. Co. v. Abell*, 18 Mo. App. 632. While the owner is entitled to recover for the expense of any additional fencing of cultivated lands made necessary by the construction of the road, he is not required by law to fence uncultivated or uncleared land, and the expense of fencing such land, should it be cleared or cultivated, is too remote and uncertain to be estimated, and should not be taken into consideration: *Raleigh etc. R. R. Co. v. Wicker*, 74 N. C. 220; *Northeastern R. R. Co. v. Sineath*, 8 Rich. 185. Unless additional fencing is necessary to the future use and enjoyment of the contiguous land, the cost of such fencing does not constitute an element of damage: *Newgass v. Railway Co.*, 54 Ark. 140, 15 S. W. 188.

In Illinois the railroad company is not bound to fence its road until six months after its completion, and in estimating the damages for a right of way across a farm, the jury have a right to consider the injury and inconvenience of having the land thrown open during the construction of the road, as an element of damage to the land owner: *St. Louis etc. R. R. Co. v. Kirby*, 104 Ill. 345; *Centralia etc. R. R. Co. v. Rixman*, 121 Ill. 214, 12 N. E. 685; *Chicago etc. Ry. Co. v. Eaton*, 136 Ill. 9, 26 N. E. 575.

f. **Cost of Crossings, Gates, or Cattle-guards.**—In estimating the damages for land taken for a railroad right of way, the right of the land owner to a crossing from one part of his land to another and the cost thereof to him should be considered: *Springfield etc. Ry. Co. v. Rhea*, 44 Ark. 258; *Bell v. Chicago etc. Ry. Co.*, 74 Iowa, 343, 37 N. W. 768; *Kansas City etc. R. R. Co. v. Baird*, 41 Kan. 69, 21 Pac. 227. The jury may allow the actual damages incident to the taking of the road arising from inconvenience in crossing the railroad, and interfering with crossings already established, which the plaintiff has sustained, as also from the failure of the railroad company to construct the crossings as required by law. But no damages can be recovered for constructing the

crossings themselves, as the company is required by statute to construct them: *East Pennsylvania R. R. v. Hlester*, 40 Pa. St. 53.

If a public highway is located and established across a railroad company's right of way, the company is entitled, in addition to damages for such right of way, to just compensation for all necessary expenditures in constructing crossings, cattle-guards, and such other things as are required by statute to be constructed by the railroad company by reason of the highway: *Kansas etc. R. R. Co. v. Board of Commissioners*, 45 Kan. 716, 26 Pac. 394; *Board of Commissioners v. Kansas City etc. Ry. Co.*, 46 Kan. 104, 26 Pac. 379, *Atchison etc. R. R. Co. v. Board of Commissioners*, 48 Kan. 576, 29 Pac. 1084; *Southern Kansas Ry. Co. v. Board of Commissioners*, 52 Kan. 138, 34 Pac. 396. A railroad company is entitled to damages for land taken by the laying out of a public highway across its railroad, subject to its use for such road, and for the expense of erecting and maintaining railroad signs and cattle-guards at the crossings, and for flooring them and keeping them in repair, but not for any increased liability for accidents, expense in ringing bells or because it may be ordered to build a bridge for the highway over its track: *Old Colony etc. R. R. Co. v. County of Plymouth*, 14 Gray, 155. If a highway is laid out across a railroad, the company is entitled to include in its damages to be paid by the township or county the expense of cattle-guards, fencing, and other outlays to complete the approaches, besides the cost of maintaining them: *Chicago etc. Ry. Co. v. Hough*, 61 Mich. 507, 28 N. W. 532; *Commissioners v. Michigan Central R. R. Co.*, 90 Mich. 385, 51 N. W. 447; *Commissioners v. Detroit etc. R. R. Co.*, 93 Mich. 58, 52 N. W. 1063. And if in addition to the things mentioned, the employment of a flagman is rendered necessary by the highway crossing, the railroad company is entitled to recover compensation for his employment: *Commissioners v. Chicago etc. R. R. Co.*, 91 Mich. 291, 51 N. W. 934. And the compensation to be made to a railroad company on the opening of a street across its tracks should include the expense of constructing, maintaining, and operating a gate or tower necessary to the protection of the public: *Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. 585. If a railroad company is put to inconvenience and expense in preparing its right of way for the construction of a telegraph line owned by another company across such right of way, the railroad company is entitled to recover compensation therefor: *Postal Telegraph Cable Co. v. Morgan's etc. R. R. etc. Co.*, 49 La. Ann. 58, 21 South. 183.

g. **Matters Causing Inconvenience in the Use of Land.**—The manner in which a railroad passing through land cuts it up, the amount and location of the land taken, and any inconvenience to the owner in passing from one part of the field through which the railroad runs to other part of such field are proper elements of damages for the taking of the right of way: *Springfield etc. Ry. v. Rhea*, 44 Ark.

258. In other words, if a railroad crosses a farm, the inconvenience in operating the farm thus divided is proper to be considered in fixing damages for the taking of the right of way: Louisville etc. Ry. Co. v. Chalcraft, 14 Ill. App. 516, McReynolds v. Burlington etc. Ry. Co., 106 Ill. 152; Chicago etc. Ry. Co. v. Nix, 137 Ill. 141, 27 N. E. 81; Bell v. Chicago etc. Ry. Co., 74 Iowa, 343, 37 N. W. 768; St. Louis etc. Ry. Co. v. McAuliff, 43 Kan. 185, 23 Pac. 112; Putnam v. Douglas Co., 6 Or. 328, 25 Am. Rep. 527; Eddings v. Seabrook, 12 Rich. 504; Texas etc. Ry. Co. v. Durrett, 57 Tex. 48-53. If the effect of constructing a railroad through a farm is to make it more inconvenient and expensive for the owner to cultivate and manage his remaining land, this is a proper element for the consideration of the jury on a petition for the assessment of the damages: Tucker v. Massachusetts etc. R. R., 118 Mass. 546; St. Paul etc. R. R. Co. v. Murphy, 19 Minn. 500; County of Blue Earth v. St. Paul etc. R. R. Co., 28 Minn. 503, 11 N. W. 73. The rule is of course the same if any sort of easement of land is taken under the right of eminent domain: Butchers' etc. Assn. v. Commonwealth, 163 Mass. 386, 40 N. E. 176. An owner of lands is entitled to damage for destroying the symmetry of his fields, by the construction of a highway, if the change in the shape of the fields produces intrinsic and real injury to the farm: Plank Road Co. v. Ramage, 20 Pa. St. 95. The inconvenience arising from having to cross the railroad from one part of the farm to another through which the railroad runs is an element of damage: St. Louis etc. Ry. Co. v. Teters, 68 Ill. 144; Chicago etc. Ry. Co. v. Gremey, 137 Ill. 628, 25 N. E. 798; Minnesota Valley R. R. Co. v. Doran, 17 Minn. 188; Omaha Southern Ry. Co. v. Todd, 39 Neb. 818, 58 N. W. 289; Fremont etc. Ry. Co. v. Bates, 40 Neb. 381, 58 N. W. 959. Inconvenience caused by embankments, excavations, ditches and any obstruction to the free egress and ingress of the premises is an element of the damage arising from the construction of a railroad through the land: Little Rock etc. Ry. Co. v. Allen, 41 Ark. 432; Omaha Southern etc. Ry. Co. v. Todd, 39 Neb. 818, 58 N. W. 289; Fremont etc. R. R. Co. v. Bates, 40 Neb. 381, 58 N. W. 959; Somerville etc. R. R. Co. v. Doughty, 22 N. J. L. 495. Cuts and fills made in the construction of a railroad through land and the inconvenience thereby occasioned in reaching the several portions of such land should be considered in assessing damages: Indiana etc. R. Co. v. Strain (Ind. App.), 62 N. E. 63; Kansas City etc. R. R. Co. v. Storey, 96 Mo. 611, 10 S. W. 203; Fremont etc. R. R. Co. v. Bates, 40 Neb. 381, 58 N. W. 959. If the ditching of adjacent land becomes necessary by reason of embankments thrown up for the road, the expense thereof is a proper element to be considered in assessing the damages: St. Louis etc. R. R. Co. v. Mollet, 59 Ill. 235. As elements of damage the facts that the railroad separates the wood, or the water, or timber from the balance of

the farm, and the inconvenience to the owner from the perpetual use of the track for moving trains over it, must be considered: *Chicago etc. R. R. Co. v. Hopkins*, 90 Ill. 316. The facts that fields are cut into inconvenient shapes and the interruption of convenient access of water for stock arising from the construction of the road should be considered as an element of damage: *White Water Valley etc. R. R. Co. v. McClure*, 29 Ind. 537; *Montgomery Road Co. v. Stockton*, 43 Ind. 329; *Inhabitants of Readington v. Dilley*, 24 N. J. L. 209. The increased inconvenience and cost of irrigating uncultivated land adapted to cultivation and requiring irrigation, which would be caused by building a railroad through the land involved, is a legitimate subject of inquiry for the purpose of ascertaining the damage sustained by the owner: *San Bernardino etc. Ry. Co. v. Haven*, 94 Cal. 489, 29 Pac. 875.

Inconvenience and delay occasioned to a manufacturer, a part of whose land is taken for a railroad, by having to convey his manufactured goods across the railroad track, and by reason of the obstruction of trains passing the manufactory, has been decided not an element of damage for which compensation must be made: *Patten v. Northern etc. Ry. Co.*, 83 Pa. St. 426, 75 Am. Dec. 612.

h. Danger from Fire.—In determining the amount of damages which a person has sustained by reason of the location of a railroad across or near his premises, it is proper for the jury to take into consideration the close proximity of the railroad to his premises, and the greater danger from fire being caused by sparks from engines running along the road: *Little Rock etc. Ry. Co. v. Allen*, 41 Ark. 431; *St. Louis etc. Ry. Co. v. Teters*, 68 Ill. 144; *Chicago etc. Ry. Co. v. Nix*, 137 Ill. 141, 27 N. E. 61; *Chicago etc. R. R. Co. v. Moore*, 63 Ill. App. 163; *St. Louis etc. R. R. Co. v. McAuliff*, 43 Kan. 185, 23 Pac. 102; *Omaha etc. Ry. Co. v. Todd*, 39 Neb. 819, 58 N. W. 289; *Fremont etc. R. R. Co. v. Bates*, 40 Neb. 381, 58 N. W. 959; *Somerville etc. R. R. Co. v. Doughty*, 22 N. J. L. 495. If part of a farm is taken for railroad purposes, danger from fire to buildings, fences, timber, or crops upon the remainder may properly be considered in estimating the depreciation of the value of the property: *St. Louis etc. R. R. Co. v. McAuliff*, 43 Kan. 185, 23 Pac. 102. Danger to fire to which the defendants property may be exposed from the operation of a railway over a right of way through his land is not to be considered, however, where the farm buildings are not near enough to the proposed track to be in danger of being destroyed by fire from the operation of the railroad. Damages from such source are too speculative to be considered: *Conness v. Indiana etc. R. R. Co.*, 193 Ill. 464, 62 N. E. 221. In Missouri it has been decided that in considering the question of damages to an owner for the occupancy of his land by a railroad track, an estimate of increased danger from fire is too

remote, and not proper to be submitted to the jury: *St. Louis etc. R. R. Co. v. North*, 31 Mo. App. 343; *St. Louis etc. R. R. Co. v. North*, 31 Mo. App. 351. Damages cannot be allowed for probable future losses by fire and explosions as independent items of damages, disconnected from the diminished value of the land, in proceedings to condemn the property for laying pipes to convey natural gas: *Indiana Natural Gas Co. v. Jones*, 14 Ind. App. 55, 42 N. E. 487.

i. **Danger to Animals.**—While the jury should not, in assessing damage in favor of a property owner upon the appropriation of land for a right of way for a railroad, take into consideration as a distinct item of damages such remote contingencies as the killing or frightening of animals and injury to persons or property by passing trains, such matters are generally considered as proper subjects of inquiry and consideration, in determining to what extent, if at all, the value of the property in question has been impaired by the construction and operation of the road: *Little Rock etc. Ry. Co. v. Allen*, 41 Ark. 431; *St. Louis etc. Ry. Co. v. Teters*, 68 Ill. 144; *Omaha etc. Ry. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289; *Fremont etc. R. R. Co. v. Bates*, 40 Neb. 381, 58 N. W. 959; *Chicago etc. R. R. Co. v. Shafer*, 49 Neb. 25, 68 N. W. 342; *Somerville etc. R. R. Co. v. Doughty*, 22 N. J. L. 495. It has been decided, however, that if the statute provides that the railroad company shall fence its track, and also a remedy to adjacent land owners for injuries to stock and property, the jury in assessing damages should not take into consideration the danger to which the defendant's stock would be exposed by reason of the operation of the railroad: *Conness v. Indiana etc. R. R. Co.*, 193 Ill. 464, 62 N. E. 221. It has been maintained that in assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the liability of teams or livestock of any kind being frightened by reason of the proximity of the railroad does not, of itself, constitute any basis for special compensation, such damages being too remote and speculative to be a proper subject of inquiry and damage: *Railway Co. v. Lyon*, 24 Kan. 745; *Florence etc. R. R. Co. v. Pember*, 45 Kan. 625, 26 Pac. 1; *Southwestern Mineral Ry. Co. v. Harvey* (Kan. App.), 54 Pac. 806.

j. **Noise, Smoke, Cinders, Vapors, etc.**—In determining the amount of damages which a person has sustained by reason of the location of a railroad across or near his premises, it is proper for the jury to take into consideration the close proximity of the railroad to his premises, and the injury and annoyance by noise and jarring caused by trains upon the track, and smoke, cinders, dust, or noisome odors or vapors from engines, as elements of his damage: *Little Rock etc. Ry. Co. v. Allen*, 41 Ark. 431; *Eliza-*

beth etc. R. R. Co. v. Combs, 10 Bush, 382, 19 Am. Rep. 67; Chicago etc. R. R. Co. v. Atterbury, 156 Ill. 281, 40 N. E. 826; Chicago etc. R. R. Co. v. Cogswell, 44 Ill. App. 388; Chicago etc. R. R. Co. v. Moore, 63 Ill. App. 163; New Orleans etc. R. R. Co. v. Barton, 43 La. Ann. 171, 9 South. 19; Adams v. Chicago etc. R. R. Co., 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629; Omaha etc. Ry. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; Sperb v. Metropolitan etc. Ry. Co., 137 N. Y. 155, 32 N. E. 1050; Matter of Utica etc. R. R. Co., 56 Barb. 456; Matter of New York etc. R. R. Co., 15 Hun, 63; Ode v. Manhattan Ry. Co., 56 Hun, 199, 9 N. Y. Supp. 338; Sloan v. New York etc. R. R. Co., 63 Hun, 300, 17 N. Y. Supp. 769; Comstock v. Clearfield etc. Ry. Co., 169 Pa. St. 582, 32 Atl. 431. Where a portion of a farm is taken for a railroad, the damages to the other portion by reason of such taking is the depreciation in the market value; and in determining this the jury may consider the smoke, noise, and annoyance consequent upon the operation of the road, as elements of damage, but not as a basis for separate and distinct damages: Weyer v. Chicago etc. R. R. Co., 68 Wis. 180, 31 N. W. 710. Vibration, smoke, noxious vapors, and noise of passing trains are to be considered in estimating the damages: Gainesville etc. Ry. Co. v. Hall, 78 Tex. 169, 22 Am. St. Rep. 42, 14 S. W. 259. Annoyance and inconvenience from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, and from smoke, so far as they arise from the use of the strip taken, may be taken into consideration in estimating the damage to the market value of the land not taken: Little Rock etc. Ry. Co. v. Allen, 41 Ark. 431; Chicago etc. Ry. Co. v. Nix, 137 Ill. 141, 27 N. E. 81; Bangor etc. R. R. Co. v. McComb, 60 Me. 290; County of Blue Earth v. St. Paul etc. R. R. Co., 28 Minn. 503, 11 N. W. 73; Bischoff v. New York etc. R. R. Co., 138 N. Y. 257, 33 N. E. 1073; Bowen v. Atlantic etc. R. R. Co., 17 S. C. 574. If the use of land taken for a storage basin will necessarily render the land owner's dwelling on his remaining land unhealthy as a residence, the fact must be considered and compensated for in estimating the damages: Johnson v. Boston, 130 Mass. 452.

k. Obstruction to Ingress or Egress.—If part of a parcel of land is taken under proceedings in eminent domain for a right of way, and the use of such right of way obstructs the means of access to, and egress from, the remainder of the property not taken, such obstruction forms a part of the injury, for which the owner is entitled to compensation: Hooper v. Savannah etc. R. R. Co., 69 Ala. 529; Little Rock etc. Ry. Co. v. Allen, 41 Ark. 431; Chicago etc. R. R. Co. v. Moore, 63 Ill. App. 163; Adams v. Chicago etc. R. R. Co., 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629; Matter of Utica etc. R. R. Co., 56 Barb. 456; Johnson v. Old Colony R. R. Co., 18 R. I. 642, 49 Am. St. Rep. 800, 29 Atl. 594. That a portion of the tract of land intersected by a right of way will

be, to a large extent, rendered inaccessible by reason of the construction and operation of a railroad is a proper element of damage: *Rock Island etc. Ry. Co. v. Gordon*, 184 Ill. 456, 56 N. E. 810. In the estimate of the damage to the land owner for the location and construction of a railroad across his land is to be included the injury which may be done him by the erection of an embankment upon the right of way, cutting off his means of access to different parts of the land which lie upon opposite sides of the track: *Mason v. Kennebec etc. R. R. Co.*, 31 Me. 215. The fact that by condemnation a railroad is empowered to run switch tracks for private use, cutting off the land owner's access to his wharf, must be considered as an element of damage: *St. Louis etc. Ry. Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 906.

1. Proximity of a Railroad or Other Structure to buildings on land not taken under the right of eminent domain, when such proximity is a source of annoyance and injury to the land owner, should generally be considered as an element in estimating his damages: *Vicksburg etc. R. R. Co. v. Dillard*, 35 La. Ann. 1045; *Lincoln v. Commonwealth*, 164 Mass. 368, 41 N. E. 489; *Somerville etc. R. R. Co. v. Doughty*, 22 N. J. L. 495; *Fremont etc. R. R. Co. v. Meeker*, 28 Neb. 94, 44 N. W. 79. Compensation for incidental damage caused to land with buildings thereon by the construction of a railroad near to, but not crossing, the land, may be recovered: *Parker v. Boston etc. R. R.*, 3 Cush. 107, 50 Am. Dec. 709. The exposure of the owner's property to particular injury from its proximity to the road, which may result from its proper construction and operation, may be considered as an element of damage: *Missouri etc. Ry. Co. v. Hays*, 15 Neb. 224, 18 N. W. 51. The continued invasion of the privacy of the occupant of a building, because of the proximity of a railroad thereto, where it has the effect of reducing the rental value of the property, is such injury as must be compensated for: *Moore v. New York etc. R. R. Co.*, 180 N. Y. 523, 29 N. E. 997. The construction of a water tank near the land owner's buildings, the location of which has the effect of multiplying trains at that point and causing a more frequent use of the roadbed on his property, must be taken into consideration in estimating his damages: *Comstock v. Clearfield etc. Ry. Co.*, 169 Pa. St. 582, 32 Atl. 431. It has been held, however, that the proximity of a depot, and the number of tracks to the premises of the land owner, and the damages arising therefrom, cannot be considered as an element in estimating the damages to the land owner from the location of a right of way for a railroad across his premises: *Cummins v. Des Moines etc. Ry. Co.*, 63 Iowa, 397, 19 N. W. 268.

m. Depreciation in Value of Property not Taken.—When part of an entire tract of private property is taken in condemnation proceedings for a public use, the land owner is entitled to recover

as his damages not only the market value of the strip of land actually taken, but also the diminished value of the remaining part of the tract. Hence, the depreciated value of the land remaining in the tract must always be taken into consideration, as an element of damage, in estimating the compensation to which the land owner is entitled: *Railway v. Combs*, 51 Ark. 324, 11 S. W. 418; *Hooper v. Savannah etc. R. R. Co.*, 69 Ala. 529; *Mobile etc. R. R. Co. v. Riley*, 119 Ala. 260, 24 South. 858; *Denver City etc. Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565; *Inlay v. Union Branch etc. R. R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Orange etc. Ry. Co. v. Craver*, 32 Fla. 28, 13 South. 444; *Selma etc. R. R. Co. v. Redwine*, 51 Ga. 470; *Smith v. Floyd County*, 85 Ga. 420, 11 S. E. 850; *St. Louis etc. R. R. Co. v. Mollet*, 59 Ill. 235; *Bloomington v. Miller*, 84 Ill. 621; *Lake Erie etc. R. R. Co. v. Scott*, 132 Ill. 429, 24 N. E. 78; *Osgood v. Chicago*, 154 Ill. 194, 40 N. E. 40; *Baltimore etc. R. R. Co. v. Lansing*, 52 Ind. 229; *Bennett v. Marlon*, 106 Iowa, 628, 76 N. W. 884; *Chicago etc. Ry. Co. v. Van Cleave*, 52 Kan. 665, 33 Pac. 472; *Edmands v. Boston*, 108 Mass. 535; *White v. Foxborough*, 151 Mass. 28, 23 N. E. 652; *Haynes v. Duluth*, 47 Minn. 458, 50 N. W. 693; *Duluth etc. R. R. Co. v. West*, 51 Minn. 163, 53 N. W. 197; *Kremer v. Chicago etc. Ry. Co.*, 51 Minn. 15, 38 Am. St. Rep. 468, 52 N. W. 977; *Kansas City etc. R. R. Co. v. Storey*, 96 Mo. 611, 10 S. W. 203; *Chicago etc. Ry. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64; *McReynolds v. Kansas City etc. Ry. Co.*, 110 Mo. 484, 19 S. W. 824; *Missouri Pac. Ry. Co. v. Hays*, 15 Neb. 224, 18 N. W. 51; *Blakeley v. Chicago etc. Ry. Co.*, 25 Neb. 207, 40 N. W. 956; *Chicago etc. Ry. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *Fremont etc. R. R. v. Meeker*, 28 Neb. 94, 44 N. W. 79; *Chicago etc. Ry. Co. v. Buel*, 56 Neb. 205, 76 N. W. 571; *Rochester etc. R. R. Co. v. Budlong*, 10 How. Pr. 289; *Durham etc. R. R. v. Church*, 104 N. C. 525, 10 S. E. 761; *Hoffer v. Penn Coal Co.*, 87 Pa. St. 221; *Greenville etc. R. R. Co. v. Partlow*, 5 Rich. 428; *White v. Charlotte etc. R. R. Co.*, 6 Rich. 47; *Snyder v. Western Union R. R. Co.*, 25 Wis. 60.

We have already classified and pointed out various items of injury which may be considered as elements of damage to the land owner for the land not actually taken, and it may be stated as a general rule that it is proper to take into consideration any and all injuries as elements of damage which tend directly to diminish the value of the remaining property: *Hooper v. Savannah etc. R. R. Co.*, 69 Ala. 529; *Railway v. Combs*, 51 Ark. 324, 11 S. W. 418; *Denver City etc. Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565; *Baltimore etc. R. R. Co. v. Lansing*, 52 Ind. 229; *Chicago etc. Ry. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64; *Missouri etc. Ry. Co. v. Hays*, 15 Neb. 224, 18 N. W. 51; *Blakeley v. Chicago etc. Ry.*, 25 Neb. 207, 40 N. W. 956; *Chicago etc. Ry. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *Commissioners v.*

Harkleroads, 62 Miss. 807; Richardson v. Commissioners, 68 Miss. 539, 9 South. 351. All injuries which are appreciable, and which result to the owner of the land from the construction of railroad or other structure over or upon the land, are legitimate subjects in the estimation of damages in condemnation proceedings: St. Louis etc. R. R. Co. v. Mollet, 59 Ill. 235. In determining the damages to a land owner, a portion of whose land is appropriated for a right of way of a railroad the railroad is to be regarded as one entire thing, and he is entitled to compensation for all damages directly resulting to the remainder of his land from the location and construction of the road, whether the roadbed be actually placed on that portion of the right of way taken from his land or not: Chicago etc. Ry. Co. v. Van Cleave, 52 Kan. 665, 83 Pac. 472. In ascertaining the damages the jury may take into consideration the real value of the land taken, and the diminished value of the remainder, and may, for that purpose, take into account not only the purposes to which the land is or has been applied, but any other beneficial purpose to which it may be applied, which would affect the amount of compensation or damage: Little Rock etc. Ry. Co. v. Allen, 41 Ark. 431; Concord R. R. v. Greely, 23 N. H. 237; Durham etc. R. R. v. Church, 104 N. C. 525, 10 S. E. 761; Cincinnati etc. Ry. Co. v. Longworth, 30 Ohio St. 108.

n. **Miscellaneous Elements of Damage.**—If land is taken for a street, and it is opened at a grade that leaves the adjoining property in a depression, the expense of putting such property in condition to make use of the street is one of the elements of damage, and it is proper to treat it as part of the case for damages for the taking: Patton v. Philadelphia, 175 Pa. St. 88, 34 Atl. 344; or if the front wall of a building is cut off by the city for the purpose of widening the street, necessitating the erection of a new wall on the new line of the street, the expense of building such wall is a proper item of damage against the city: Patterson v. Boston, 20 Pick. 159. But the cost of clearing snow from sidewalks along a proposed street is not a proper element of damage to be allowed the property owner through whose land the street will pass: Detroit v. Beecher, 75 Mich. 454, 42 N. W. 986.

The costs and expenses to the owner of the land incurred in the condemnation proceedings is a proper element of the damages to be awarded him for the taking of his land: United States v. Dumplin Island, 1 Barb. 24. It has, however, been also decided that counsel fees paid by the land owner cannot be recovered by him as part of his compensation: San Jose etc. R. R. Co. v. Mayne, 63 Cal. 566, 23 Pac. 522.

If part of a lot upon which buildings are under process of construction is condemned for a public use, the cost of the founda-

tions laid on the land taken, and also the cost incurred in changing the plan of the buildings to meet the new conditions, are elements of damage, to which the lot owner is entitled: *Matter of New York etc. Bridge*, 18 App. Div. (N. Y.), 8, 45 N. Y. Supp. 484. The cost of rebuilding a tramway, relaying tracks, or like changes in the working property of a mining company, made necessary by taking part of its property for a public use, is a proper matter to be considered in estimating the damage to the company: *Chicago etc. Ry. Co. v. Wolf*, 137 Ill. 360, 27 N. E. 78; *Chicago etc. Ry. Co. v. Ward*, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562. If property on which a coal mine is situated is condemned for railroad purposes, the owner is entitled, in addition to the value of the mining property and appliances taken, to the necessary cost of necessary changes and readjustment of all of the mining appliances not taken to the changed condition of the property after the taking: *Chicago etc. Ry. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931. If land is taken, the cost of reconstructing a bridge thereon is an element of damage: *Kansas v. Kansas City etc. Ry. Co.*, 102 Mo. 633, 14 S. W. 808.

If a private toll-bridge is taken for public use free of toll, the value of all of the appurtenances to the bridge, such as toll-house approaches to the bridge, the franchise to take tolls, and the like must be considered as elements of damage, and paid for in addition to the value of the bridge itself: *Montgomery Co. v. Schuylkill Bridge Co.*, 110 Pa. St. 54, 20 Atl. 407; *Clarion Bridge Co. v. Clarion Co.*, 172 Pa. St. 242, 33 Atl. 580.

Damages arising from the piling up of earth excavated from a railroad bed and ditches is an element that may ordinarily be taken into consideration in determining the damages in condemnation proceedings: *Chicago etc. Ry. Co. v. Brinkman*, 47 Ill. App. 287; or if a large amount of earth is taken outside the right of way asked for in constructing the road that must be paid for in estimating damages: *White Water Valley R. R. Co. v. McClure*, 29 Ind. 537. In another case, however, the contrary was decided, the court holding that the taking of such earth was an independent trespass, for which a separate action might be maintained, but that no compensation could be made therefor in the condemnation proceedings: *Leavenworth etc. Ry. Co. v. Usher*, 42 Kan. 637, 23 Pac. 734.

PERKINS v. BERTRAND.

[192 ILL. 58, 61 N. E. 405.]

ELECTION RETURNS SHOULD NOT BE ACCEPTED AS CONCLUSIVE if the judges of election have been so careless in the performance of their duties as to cast discredit upon their returns. (p. 316.)

ELECTIONS.—BALLOTS ARE THE BEST EVIDENCE in determining the result of an election if it appears that they have been preserved in the manner, and by the officers, prescribed by the statute, and have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with. (p. 316.)

ELECTIONS.—WHETHER BALLOTS HAVE BEEN PROPERLY PRESERVED is a question of fact, to be determined from all the circumstances proved. (p. 316.)

ELECTIONS — BALLOTS — INITIALS OF JUDGE.—While the statute requiring the official indorsement of the initials of a judge of election is mandatory, yet the indorsement of one initial is a substantial compliance therewith. (p. 319.)

ELECTIONS — BALLOTS — NAME OF JUDGE.—A ballot properly prepared by a voter and deposited in the ballot-box should be counted, although the judge of election, without the participation of the voter, indorsed his full name thereon instead of his initials. (p. 319.)

ELECTIONS — BALLOTS — DISTINGUISHING MARKS.—Ballots containing crosses in the circles at the head of the two tickets, also a cross in the square before the name of one of the nominees, are properly counted for the latter. (p. 320.)

ELECTIONS — BALLOTS — DISTINGUISHING MARKS.—Ballots marked in the circle at the head of the ticket, where the voter has erased the other tickets upon the ballot by drawing lines through them, should not be counted. (p. 320.)

ELECTIONS—BALLOTS — APPELLATE PRACTICE.—The action of the trial court in counting ballots alleged to contain distinguishing marks cannot be disturbed on appeal, if such ballots are not certified to the appellate court for inspection. (p. 320.)

ELECTIONS.—OFFICIAL BALLOTS properly marked and initialed, and found in a sealed envelope marked "defective and objected to ballots," may be counted if the reasons given by the judges of election where they were cast for not counting them contain no valid objections. (p. 321.)

ELECTIONS — ILLEGAL BALLOTS — RIGHT TO COMPLAIN OF.—Ballots not containing the initials of any judge of election should not be counted, but the right to object to them on appeal is lost if the record does not disclose for whom they were counted, nor that any objection was made to the count thereof. (p. 322.)

ELECTIONS — BALLOTS — DISTINGUISHING MARKS.—Ballots with figures thereon placed there by the judges of election at the time they were cast under a mistaken view of the law, and without the knowledge of the voter, should be counted. (p. 322.)

C. C. Stilwell, for the appellant.

O. Hebet, for the appellee.

⁵⁹ HAND, J. This is a proceeding begun in the county court of Cook county by appellee, to contest the election of appellant to the office of supervisor of the town of North Chicago. At the general election held April 3, 1900, in the town of North Chicago, for the election of town officers, the parties were opposing candidates for the office of supervisor of said town, their names appearing upon the official ballot as nominees of the Republican and Democratic parties, respectively. On April 7, 1900, the canvassing board of the city of Chicago canvassed the returns of said election, as provided for by law, and declared that the appellant had received eleven thousand nine hundred and fifty-three votes, and the appellee eleven thousand eight hundred and ninety votes for said office, whereupon a certificate of election was issued to appellant. On May 2, 1900, appellee filed a statement in the county court of said county for the purpose of contesting the election of appellant. Issues were formed and the cause heard, and the court entered a decree finding that appellee had received eleven thousand eight hundred and fifty-nine votes, and appellant eleven thousand eight hundred and twenty-three votes, and that appellee was duly elected to said office, and the appellant has prosecuted this appeal.

The ballots cast at the election were opened and counted by the court, and the decree was based upon ⁶⁰ such recount, to which action of the court objection was made by the appellant on the ground that the ballots should not prevail over the returns of the judges of the election, for the reason that said ballots had not been properly identified and preserved.

In *Collier v. Anlicker*, 189 Ill. 34, 59 N. E. 615, we say (189 Ill. 37, 59 N. E. 616): "Two rules upon this subject have been laid down by the decisions of this court: 1. The returns should not be accepted as conclusive if the judges of the election have been so careless in the performance of their duties as to cast discredit upon their returns: *Catron v. Craw*, 164 Ill. 20, 46 N. E. 3; *Dooley v. Van Hohenstein*, 170 Ill. 630, 49 N. E. 193; *Murphy v. Battle*, 155 Ill. 182, 40 N. E. 470; *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012; 2. The ballots are considered the best evidence in determining the result of an election when it appears that they have been preserved in the manner and by the officers prescribed in the statute, and have not been so exposed to the reach of unauthorized persons as to af-

ford a reasonable probability of their having been changed or tampered with: *Catron v. Craw*, 164 Ill. 20, 46 N. E. 3; *Caldwell v. McElvain*, 184 Ill. 552, 49 N. E. 193; *Beall v. Albert*, 159 Ill. 127, 42 N. E. 166; *Bonney v. Finch*, 180 Ill. 133, 54 N. E. 318." And in *Kreider v. McFerson*, 189 Ill. 605, 60 N. E. 49, it is held that whether the ballots have been properly preserved is a question of fact, to be determined from all the circumstances proved.

The evidence shows that the boxes containing the ballots cast at said election were returned, properly sealed, on the evening of the 3d or the morning of the 4th of April, 1900, by the judges of election, to the board of election commissioners of the city of Chicago; that they were carefully guarded by the employes of the board of election commissioners until they were placed in the vault in room 316, on the third floor in the city hall in the city of Chicago, under the direction of said commissioners; that they were not tampered with, and the seals on each and all of said boxes were undisturbed when placed in said vault; that afterward the vault was ⁶¹ closed; that the inside door was sealed by Stevens, Hudson, and Moriarty, clerks in the board of election commissioners' office, each of them using an individual seal; that the outer door of said vault was locked by a combination lock and sealed by Isaac N. Powell, chief clerk of the board of election commissioners; that Isaac N. Powell was the only person having the combination of the lock of said vault; that said vault was not again opened until Sunday, the twenty-ninth day of April, 1900; that before said vault was opened on said day Stevens, Hudson, Moriarty, and Powell each examined their individual seals on the outer and inner vault doors and found them intact and undisturbed; that on that day the vault was opened and the boxes containing said ballots were taken from the vault by the clerks of said board of election commissioners, placed in baskets, and loaded on trucks, put on an elevator, and removed to and stored in another vault located on the fourth floor of said building; that during the removal thereof from the vault on the third to the vault on the fourth floor of said building the seals on said boxes were not disturbed or the ballots tampered with or handled; that the time consumed in the removal of said ballots from the vault on the third floor to the vault on the fourth floor was not to exceed four hours; that after they were placed in the vault on the fourth floor the inner door of said vault was closed and sealed by Stevens, Hudson, and Moriarty, each using an individual seal; that the outer

door of said vault was locked by Isaac N. Powell with a combination lock, and that said Isaac N. Powell was the only person having the combination of the lock to said vault; that said vault contained only ballots cast at said election, and each time before the same was opened thereafter, Stevens, Hudson, and Moriarty examined their individual seals and in all cases found them intact and undisturbed, and that said vault was only opened by said Isaac N. Powell and in the presence of Stevens, Hudson, and Moriarty; ⁶² that said vault was guarded at night by a watchman employed by said board of election commissioners, and that said boxes containing the ballots cast at said election were never removed from said vault from the twenty-ninth day of April, 1900, when they were placed therein on the fourth floor of said building, until they were produced by said Isaac N. Powell to be counted in this contest, with the exception of the boxes containing the ballots from the first, second, third, fourth, fifth, sixth, seventh, eighth, thirteenth, fourteenth, and fifteenth precincts of the twentieth ward; that there was an election contest pending in the city council of the city of Chicago for the office of alderman of the twentieth ward in said city between William J. Danforth and William Einfeldt; that said Danforth filed a petition with the city council of the city of Chicago setting forth that he and Einfeldt were candidates for the office of alderman for the twentieth ward at the election held on April 3, 1900; that their respective names as candidates appeared upon the official ballot; that there were irregularities at said election, and charging that he was elected alderman of said ward instead of Einfeldt. Said contest was referred to the committee on elections by the said city council; that on the fourth day of June an order was passed by said city council ordering that the board of election commissioners of the city of Chicago be requested to produce before a subcommittee of said city council the ballots cast in said precincts of said ward at the election of April 3, 1900, to be used by said committee as evidence in said contest; that said order was presented to the board of election commissioners on the sixteenth day of June, 1900; that on the ninth day of June, 1900, a subcommittee of the city council of the city of Chicago, consisting of three aldermen, appeared at the office of the election commissioners; that in pursuance of the order of said council of the city of Chicago the clerk of said board of election commissioners produced the boxes containing the ballots ⁶³ cast at the election on April 3, 1900, in said precincts of said ward,

to be used by said subcommittee as evidence in said contest; that the boxes containing said ballots were opened by Isaac N. Powell, the chief clerk of said board, in the presence of said election commissioners, said subcommittee, the contestants and their attorneys, and the ballots counted; that immediately after such recount they were returned to the respective boxes from which they had been taken, resealed, and again placed in said vault; that during such recount said ballots were not mutilated, disfigured, or in any manner changed, but were returned to said boxes in the same condition in which they were taken therefrom, and after their return thereto remained in said vault, with the other boxes containing ballots, until they were produced in court to be recounted in this contest.

The ballots were fully identified and properly and safely kept, and not exposed to the risk of being tampered with, and the court did not err in holding that they were better evidence, in determining the result of the election, than the returns of the judges of the election, and in basing its decision upon such recount and not upon the returns of the judges of the election.

The questions raised in the court below and discussed in the briefs filed in this court are numerous, cross-errors having been assigned. The ballots objected to, however, with few exceptions, which are not sufficiently numerous to affect the result, may be classified and the questions raised disposed of under the following heads:

1. A number of ballots were counted which had indorsed upon the back thereof only a single initial of one of the judges of election. The object of requiring one of the judges of election to officially indorse on the back of the ballot his initials before giving it to the voter is to identify the ballot as being one which had been cast at the election. Such identification is as complete from one initial as from all of the initials of such judge, and ⁶⁴ the voter should not be disfranchised by reason of the failure of such judge of election to literally comply with the statute in that regard. While the statute requiring such official indorsement is mandatory (*Kelly v. Adams*, 183 Ill. 193, 55 N. E. 837), the indorsement of one initial is a substantial compliance with the statute, which is all that is required; also, under a well-known canon of construction in force in this state (3 *Starr & Curtis' Statutes of 1896*, c. 131, sec. 1, par. 3), words importing the plural number include the singular. The court did not err in counting such votes. In *Horning v. Board of Canvassers*, 119 Mich. 51, 77 N. W. 446, under the provisions of the election

laws of that state requiring the inspector to write his initials upon the upper left-hand corner of the ballot and declaring void all ballots not indorsed with the initials of the inspector, as provided in the act, it was held ballots inadvertently indorsed by the inspector in the lower right-hand corner should be counted. To the same effect is *Parvin v. Wimberg*, 130 Ind. 561, 30 Am. St. Rep. 254, 30 N. E. 790.

2. A number of ballots were counted which had indorsed upon the back thereof the full name of the judge of election, instead of his initials. In *Gill v. Shurtleff*, 183 Ill. 440, 56 N. E. 164, it was held that where a legal voter properly prepares his ballot and the same is placed in the ballot-box, it should be counted, although some one of the election officers, without participation of the voter, made an indorsement on such ballot which might serve as a distinguishing mark. Under the rule as thus announced such votes were properly counted.

3. A number of ballots were counted with a cross in the Republican and Democratic circles, and a cross in the square preceding "Bertrand" or "Perkins." In the case of *Vallier v. Brakke*, 7 S. Dak. 343, 64 N. W. 180, a well-considered case construing the Australian ballot act of that state, which is substantially the same as the act in force in this state, the court held that a ballot marked with a circle at the head of both the Republican and People's ⁶⁵ Party tickets and a cross at the left of the name of the plaintiff was correctly counted for the plaintiff, on the ground that the cross at the head of the two tickets neutralized each other and was equivalent to a cross at the head of neither, and that the cross to the left of the plaintiff's name made it a vote for the plaintiff. Under this authority, which seems to be the only one directly in point, the court properly counted ballots thus marked for the candidate before whose name the cross appeared in the square.

4. The court declined to count ballots marked in the circle at the head of the Republican or Democratic tickets in cases where the voter had erased the other tickets upon the ballot by drawing vertical lines through the same. This ruling was correct. In *Kelly v. Adams*, 183 Ill. 193, 55 N. E. 837, where the fac-simile of a similar ballot is printed, the court held that such ballot was improperly counted, on the ground that such lines amounted to distinguishing marks, and avoided the ballot.

5. The court counted a number of ballots upon the face of which appeared letters, words, or marks made by the voter, which were claimed to be distinguishing marks. The original ballots

have not been certified to us for inspection, and the trial court, from an inspection thereof, was in much better position to determine the question, which is largely, if not wholly, a question of fact (*Kelso v. Wright*, 110 Iowa, 560, 81 N. W. 560), whether said letters, characters, and marks were distinguishing marks, or whether they simply evidenced the honest intention of the voter to indicate the candidate or candidates for whom he desired to cast his ballot, than we are from a description of such ballots or from the exhibits found in the record. We are not, therefore, inclined to overrule the action of the trial court in counting said ballots. In *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, it was contended that the word "yes" or "get" upon a ballot amounted to a distinguishing mark, and that the trial court erred in counting the same. ⁶⁰ In disposing of such contention we say (158 Ill. 618, 41 N. E. 1005): "The word 'yes' or 'get' tended to indicate the voter's choice upon the proposition submitted; and that it served the further purpose of distinguishing the ballot is, to say the least, a very remote conjecture."

6. The court counted a number of ballots found in the envelopes containing "defective and objected to" ballots. Before counting the same the judges of the precincts from which the ballots came were called and testified that the ballots were voted by legal voters, and gave their reasons for not counting the same, none of which appear to be valid. Said ballots were official, had the initials of one of the judges of the respective precincts on the back thereof, were properly marked by the voter, and were inclosed in envelopes securely sealed, and so marked and indorsed as to disclose their contents, as provided by section 26 of the ballot act. The court did not err in counting such ballots.

7. The court counted a number of ballots which, it is contended, should not have been counted because not properly marked, of which the following are examples: "Ballot with no marks on its face except two in the circle at the head of the Democratic ticket; two pen-marks meeting at a point. The court thinks, on close examination, these two pen-marks cross. Counted for Perkins." "Ballot with a cross in the circle at the head of the Republican ticket. There are two pen-marks that look like blots, one immediately to the left in the first square, and the other one over the square, before the names 'Bertrand' and 'Weil' and partially over 'Schmidling.' The court thinks they were made by accident. Counted for Bertrand." The trial

court saw the original ballots, and in some instances examined them with a magnifying glass, and was in a much better position to judge than we, whether or not the same were probably marked by the voter. It is therefore impossible for us to say they were not properly marked and entitled to be counted.

8. Appellant objects to the counting of ten ballots that did not have the initials of any judge of election on the back thereof. Under the authority of *Kelly v. Adams*, 183 Ill. 193, 55 N. E. 837, such ballots were not entitled to be counted. The record in this case, however, does not disclose for whom they were counted, nor that at the time they were counted appellant objected to the count thereof. It is now too late for him to make such objection. For aught that appears, they were all counted for the appellant.

9. Ballots were counted which had figures thereon, placed thereon by the judges at the time they were cast, under a mistaken view of the law and without the knowledge of the voter, of which the following are examples: "Ballot marked for Perkins has on back figure '3,' counted for Perkins." "Ballot marked for Bertrand has on back, in lead pencil, figure '13,' counted for Bertrand." In *Pennington v. Hare*, 60 Minn. 146, 62 N. W. 116, where ballots had been numbered, without the knowledge of the electors casting them, by the judges of election, by reason of a misunderstanding of the law on their part, the ballots were held to be properly counted for their respective parties, the court say (60 Minn. 147, 62 N. W. 117): "To hold otherwise would place it in the power of election officers to disfranchise electors at their pleasure." Such votes were properly counted.

We have examined each question presented by this record with care, and while it is impossible to comment in this opinion upon each of the numerous ballots to which objections have been made, we have carefully considered the same, and have reached the conclusion that the county court properly held the ballots to be the best evidence from which to determine the result of said election, and that said court committed no reversible error in the recounting of said ballots.

The decree of the county court will, therefore, be affirmed.

Elections.—Ballots are the best evidence in an election contest of how the electors voted: *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454. A perfect ballot is exclusive evidence of a voter's intent: *Wimmer v. Eaton*, 72 Iowa, 374, 2 Am. St. Rep. 250, 84 N. W. 170. See, also, *Coughlin v. McElroy*, 72 Conn. 99, 77 Am. St. Rep. 301, 43 Atl. 854.

Marks on Election Ballots which appear to have been made inadvertently or accidentally, and not for any evil purpose, are not within the meaning of a statute requiring the exclusion from the count of all ballots having thereon marks not authorized by law, and should not be construed as identifying or distinguishing marks: *Dennis v. Caughlin*, 22 Nev. 447, 58 Am. St. Rep. 761, 41 Pac. 768; *Coughlin v. McElroy*, 72 Conn. 99, 77 Am. St. Rep. 301, 43 Atl. 854. See, further, the monographic note to *Taylor v. Bleakley*, 49 Am. St. Rep. 246-248.

Election Ballots.—When a cross is placed in the circle preceding the party appellation, and one or more crosses are placed before the names of candidates on another ticket, the ballot is to be counted for the candidates so marked: *Whittam v. Zahorik*, 91 Iowa, 23, 51 Am. St. Rep. 317, 59 N. W. 57. See, further, *Young v. Simpson*, 21 Colo. 460, 52 Am. St. Rep. 254, 42 Pac. 666, monographic note to *Taylor v. Bleakley*, 49 Am. St. Rep. 240-243.

An Election Ballot Indorsed by the clerk at an improper place cannot, for that reason, be rejected: *Parvin v. Wimberg*, 130 Ind. 561, 30 Am. St. Rep. 254, 30 N. E. 790. Neither will a ballot be rejected because of marks made by election officers after it has been cast by the voter: *State v. Sadler*, 25 Nev. 131, 88 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128.

KELLY v. PEOPLE.

[192 Ill. 119, 61 N. E. 425.]

CRIMINAL LAW.—UNCORROBORATED TESTIMONY OF AN ACCOMPLICE is sufficient to convict a person of crime. (p. 324.)

CRIMINAL LAW—CRIME AGAINST NATURE.—An indictment charging a crime against nature in the language of the statute, or so plainly that its nature may be easily understood by the jury, is sufficient, and it need not set forth the manner of committing the offense. (p. 325.)

CRIMINAL LAW—BILL OF PARTICULARS.—It is only when it appears that defendant cannot properly prepare his defense without a bill of particulars, that the court will require the prosecuting attorney to furnish it. (p. 325.)

J. E. W. Wayman, for the appellant.

H. J. Hamlin, attorney general, C. S. Deween, state's attorney, and F. L. Barnett, for the people.

¹¹⁹ WILKIN, C. J. At the February term, 1901, of the criminal court of Cook county plaintiff in error was convicted of the "crime against nature." His motions for a new trial and in arrest of judgment were overruled, and he was sentenced to the penitentiary at Joliet. By this writ of error he brings before us for review that record of conviction.

Most of the grounds of reversal urged have been decided adversely to the contention of counsel for plaintiff in error in the late case of *Honselman v. People*, 168 Ill. 172, 48 N. E. 304.

It is first insisted that the evidence of guilt produced upon the trial is insufficient to justify the verdict of the ¹²⁰ jury. The indictment charged the crime, substantially in the language of the forty-seventh section of the Criminal Code, to have been committed upon and with one Lyle Patterson, averred in the first count to be "a man" and in the second and third "a male person." The proof shows that Lyle Patterson was at the time a boy between six and seven years of age. He was sworn, and testified upon the trial to acts of copulation by the defendant, first by means of his own mouth upon him, the boy, and then by means of the mouth of the boy upon defendant. If the testimony of the boy is to be believed, there can be no doubt but that, under the law as laid down in the *Honselman* case, the crime was established. The defendant positively denied the charge and the acts sworn to by the boy. Other witnesses testified upon the trial, but we find nothing in their evidence which can be said to corroborate or contradict that of the prosecuting witness or the defendant as to the criminal acts.

In view of the extreme youth of the boy we have carefully scrutinized his testimony and endeavored to apply to it all the rules for testing its truthfulness, and have reached the conclusion that there is no sufficient legal reason for discrediting it. No motive to falsely accuse the defendant, either on the part of the child or others, can be discovered. His father and other parents who believed their children had been outraged and debauched by similar practices, were anxious to discover the guilty party, and have him punished, but there is nothing in the evidence from which we can perceive a motive to falsely charge this defendant.

In some jurisdictions the uncorroborated testimony of an accomplice is never sufficient to convict one of a crime. But that is not the rule in this state. Besides, consent on the part of the boy in this case cannot be presumed, he being incapable of understanding the nature of the act. He was incapable of committing a crime. We are not unmindful of the fact that the crime is of a class ¹²¹ easily charged and difficult to disprove, and that it should, therefore, be established with clearness; but whether it was established in this case must depend upon whether or not the jury believed the testimony of Lyle Patterson. The court instructed the jury, on behalf of the defendant, "that the

credibility of the witnesses is a question exclusively for the jury; that the jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent intelligence or lack of intelligence, their youth, and from all the surrounding circumstances appearing on the trial, which witnesses are to be worthy of credit and to give credit accordingly." This instruction properly directed the jury as to the tests of credibility. No complaint is made of any of the instructions given on the questions of fact, and they were, to say the least, fair to the defendant. The testimony, then, on behalf of the people being competent and sufficient to justify a verdict of guilty if believed by the jury, and the finding being approved by the presiding judge, it is not for this court to interfere.

Counsel says if the crime set out in the forty-seventh section of the Criminal Code is the common-law crime against nature, the evidence does not make out the offense. That is conceded; but we have held that it is not the common-law crime: *Honselman v. People*, 168 Ill. 172, 48 N. E. 304.

Again, counsel says: "If the offense is a statutory one, and generic, as held in *Honselman v. People*, 168 Ill. 172, 48 N. E. 304, then the indictment is fatally defective, or the court erred in overruling defendant's motion for a bill of particulars." The indictment in the *Honselman* case is exactly like the one here, and we held it sufficient. We did not say the definition of the crime was "generic," but did hold that because of the abominable nature of the crime it was not necessary to set forth in detail the manner in which it was committed; and also that under our Criminal Code and the repeated decisions of this court it was sufficient to allege the crime in the language of the statute, or so plainly ¹²² that its nature might be easily understood by the jury. The manner of committing the offense being too indecent to be set forth in the indictment itself, we are at a loss to perceive how it could be consistently incorporated in a bill of particulars. It is only when it is made to appear that the defendant cannot properly prepare his defense without a bill of particulars that the court will require the prosecuting attorney to furnish it. In this case the indictment informed the defendant that he was charged with the crime against nature with and upon Lyle Patterson, and that was sufficient: *Honselman v. People*, 168 Ill. 172, 48 N. E. 304. In short, we think counsel for plaintiff in error, throughout his argument, disregards the principal grounds upon which the indictment in the *Honselman*

case was held sufficient—that is, the fact that such a crime cannot be described without shocking the moral sensibilities. Blackstone says, speaking of this crime: “I will not act so disagreeable a part to my readers as well as myself as to dwell any longer upon a subject the very mention of which is a disgrace to human nature. It will be more eligible to imitate the delicacy of our English law, which treats it, in its very indictments, as a crime not to be named”: 4 Blackstone’s Commentaries, 215.

While he does not say so, the argument of counsel for plaintiff in error inevitably leads to the conclusion the Honselman case does not correctly lay down the law, and should be overruled. This we have no disposition to do.

We infer from statements in the argument of counsel for the people that a distinction has been attempted to be drawn between cases in which the defendant is charged with using his mouth upon another (which was the Honselman case) and in which he uses the mouth of the other upon himself, and to maintain that while he may be guilty in the former case he cannot be held so in the latter. We find nothing in the argument of counsel for plaintiff in error to that effect. Even if such a distinction could be drawn it would avail nothing to plaintiff in error in ¹²⁸ this case, because, as we have seen, the evidence proves both acts. We are, however, unable to see upon what reasoning any such distinction can be based.

We find in this record no reversible error. The judgment of the criminal court will be affirmed.

An Indictment Stating an Offense in the Terms of the statute is generally considered sufficient: *Dickhaut v. State*, 85 Md. 451, 60 Am. St. Rep. 332, 35 Atl. 21; *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447, 45 N. E. 303; *People v. King*, 110 N. Y. 418, 6 Am. St. Rep. 389, 18 N. E. 245; extended note to *State v. Campbell*, 94 Am. Dec. 253. An indictment charging an attempt to commit the crime against nature is sufficient without stating any particular act constituting the attempt: *Bradford v. State*, 104 Ala. 68, 53 Am. St. Rep. 24, 16 South. 107.

The Uncorroborated Testimony of an Accomplice is insufficient to warrant a conviction: *State v. Kellar*, 8 N. Dak. 563, 73 Am. St. Rep. 776, 80 N. W. 476. A conviction for incest cannot be based upon the uncorroborated testimony of the woman, who was an accomplice, voluntarily yielding herself to the intercourse: *Shelly v. State*, 95 Tenn. 152, 49 Am. St. Rep. 926, 31 S. W. 492; *Stewart v. State*, 35 Tex. Cr. Rep. 174, 60 Am. St. Rep. 85, 32 S. W. 766. And where in sodomy the prosecuting witness consents to the act, he is an accomplice, whose testimony must be corroborated: *Medis v. State*, 27 Tex. App. 194, 11 Am. St. Rep. 192, 11 S. W. 112. See, further, the monographic note to *Commonwealth v. Price*, 71 Am. Dec. 671-678.

WEST CHICAGO MASONIC ASSOCIATION v. COHN.

[192 ILL. 210, 61 N. E. 439.]

NEGLIGENCE—EXCAVATIONS UNDER SIDEWALK.—A licensee from a city who constructs a vault underneath the sidewalk and a coal-hole thereon need exercise only reasonable and ordinary care and precaution for the public safety. (p. 330.)

LANDLORD AND TENANT—CONDITION OF PREMISES. If a vault under a sidewalk and coal-hole connecting therewith are constructed by the owner of the premises under license from the city, and are in good condition when he delivers possession to the tenant in exclusive possession of that portion of the building with which such vault and coal-hole are connected and used, the tenant under his covenant to make repairs, and not the landlord, is liable for injuries caused by failure to keep the covering of the coal-hole in repair. (pp. 333, 334.)

F. W. Walker and K. S. Boreman, for the appellant.

Smith, Helmer, Moulton & Price, for the appellee.

213 BOGGS, J. This is an appeal from the judgment of the appellate court for the first district affirming a judgment in the sum of one thousand dollars, entered in the circuit court of Cook county in favor of appellee and against the appellant company.

The declaration was in case, and as finally amended contained but a single count. The substance of the allegations of this count was, the appellant company was the owner of a certain building and premises and appurtenances in Cook county, abutting on West Randolph street, in Chicago, and was then and there receiving rents, issues and profits from the said building and premises, and that in said street, before and on the day aforesaid, there was a certain hole opening into a certain cellar and vault connected with the said building and premises of the defendant, which said cellar and vault, by consent of the said city of Chicago, extended into and under the said public highway, and was connected with, and appurtenant to, a certain portion of said building and premises occupied by a tenant of the said defendant, from whom the defendant was then and there receiving rent therefor, yet the defendant, well knowing the matters aforesaid, while it was so the owner of the said building and premises, with the appurtenances, and was so receiving the rents, issues, and profits thereof, as aforesaid, and while there was such a hole, as aforesaid, there wrongfully and unjustly

permitted the said hole to be and continue, and the same was then and there so badly, insufficiently, and defectively covered, that by means of the premises, and for want of a sufficient covering on said hole, the plaintiff, who was then and there passing in and along the said highway, then and there necessarily and unavoidably slipped and fell into said hole, and thereby the right leg of the plaintiff was injured at the knee, and the right knee of the plaintiff was badly bruised, torn, and injured, etc. The cause was submitted to a jury ²¹⁴ for decision, and judgment was rendered against the appellant company, as before stated.

It appeared the appellee, Cohn, on the twelfth day of November, 1895, stepped or fell into a coal-hole in the sidewalk in front of No. 200 West Randolph street, in the city of Chicago, and thereby received the injuries for which the action was brought. The appellant company was then, and had for many years before that been, the owner of the four-story and basement building at the corner of Halsted and West Randolph streets, known as Nos. 200, 202, and 204 West Randolph street. The coal-hole in the sidewalk into which the appellee fell opened into a vault under the walk, which was connected with and constituted an appurtenance to the basement of No. 200 of said building. This basement, and the appurtenance thereto (the vault under the sidewalk into which the coal-hole opened), was then in the possession of one Henry Wilker, as tenant of the appellant company. Said Wilker had occupied the basement proper as a saloon, and used the vault under the walk for water-closets and to receive and store coal, for six years. There was evidence tending to show that neither the appellant company nor any of its tenants in the building other than Wilker had access to said vault containing said water-closets and coal-bin, but said Wilker had entire control thereof, the only entrance thereto being from the saloon occupied by him, and that the vault was not appurtenant to any other part of the building.

The first lease to Wilker bore date May 1, 1889, and ran for three years—to April 30, 1892. The second lease ran from May 1, 1892, to April 30, 1894—two years. The third lease ran from May 1, 1894, to April 30, 1896. The leases contained covenants to the effect the lessee had received said demised premises in good order and condition, and at the expiration of the time in the leases mentioned, or a sooner determination thereof by forfeiture, he would yield up the said premises to the lessor in as ²¹⁵ good a condition as when the same were entered upon by

the lessee, loss by fire or inevitable accident, or ordinary wear excepted, "and also will keep said premises in good repair during this lease, at his own expense," and keep said premises in a clean and wholesome condition, in accordance with the ordinances of the city, and directions of the health officers. He further agreed that all plumbing, water-pipes, gas-pipes, and sewerage should be at the risk of the lessee; that he would make all repairs required to the walls, ceiling, paint, plastering, plumbing work, paper, and fixtures belonging to said apartments, or used in connection therewith, whenever damage or injury to the same shall have resulted from misuse or neglect. It was during the period of the latter lease that the appellee slipped, stepped, or fell into the coal-hole.

The evidence tended to show that under such lease said Wilker then had exclusive control of the basement and vault in question under the sidewalk into which the coal-hole opened, and that the appellant company provided a janitor for the building, but did not occupy any of the rooms or offices in the building, except that the janitor used one room as his office; that he had no duties in connection with the saloon in the basement or with the vault under the sidewalk. There was no proof tending to show the injury was occasioned by any defect in the original construction of the coal-hole or of the cover thereto. It was clearly made to appear that, as between the appellant company and said Wilker, the duty of exercising care to the end the covering of the coal-hole should be kept safe rested on Wilker.

The court, on its own motion, instructed the jury as follows: "The court instructs the jury that public property cannot be taken or used without compensation, for private use, with or without the consent of the public corporate authorities owning the same, without subjecting the private person or corporation using the same to a ²¹⁶ duty to use it in such manner as will not entail injury to or upon a citizen rightfully entering upon same, and using reasonable and ordinary care in so doing; and this duty the person or private corporation using such property cannot, as a matter of public policy, escape by leasing the same for compensation to a tenant."

This instruction is erroneous in at least two respects: 1. Municipal authorities hold the streets of a city in trust for the use of the public, and cannot divert a street, or any portion thereof, to any purpose inconsistent with the full and free right of the public to use the same. But the city of

Chicago had ample power to authorize the construction of the vault in question under the sidewalk, and the coal-hole in the walk to connect with the vault thereunder, provided the paramount right of the public to the full, free, and safe use of the street, in all of its parts, was not thereby infringed: *Gridley v. Bloomington*, 68 Ill. 47; *Gregsten v. Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426. The declaration averred the city authorized the construction of the vault and coal-hole here in question. When an abutting owner or other person makes an excavation in or under the sidewalk of a street without license from the municipal authorities he is a trespasser and the excavation a nuisance, and he becomes liable to anyone who may be injured thereby without contributory negligence on the part of such injured person. If, however, such abutting property owner, or other person so making the excavation in or under the sidewalk of a public street, has authority or license from the proper city authorities so to do, and the work is not inherently, in nature and character, a nuisance, the licensee is liable only in the event he fails to use ordinary care and diligence in constructing the excavation, and keeping it in such repair that it shall be as safe for the use of the public as any other part of the sidewalk: *Elliott on Roads and Streets*, 772, and authorities cited in note 3; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *McGuire v. Spencer*, 91 N. Y. 303, 43 Am. Rep. 668; ²¹⁷ *Shearman and Redfield on Negligence*, 5th ed., sec. 703; *Trustees of Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971. Counsel for the appellee concede the appellant company was a licensee, and not a trespasser, and that the duty devolving upon it was no greater than to exercise ordinary care. In their brief counsel say: "We do not charge it, as trespasser, as maintaining a nuisance; we merely charge it with the obligation of exercising due care and diligence in the maintenance of the sidewalk." The instruction charged it upon the appellant company as an absolute duty to keep the sidewalk safe, and excluded from consideration as a defense every circumstance of care, prudence, or diligence on its part, to make and keep it safe, in determining as to its liability for the injury to the appellee. Having license from the city to construct the vault and coal-hole, only reasonable and ordinary care and precaution for the public safety was, in any event, required by law of the appellant.

2. It was error to advise the jury, as was done by the instruction, that out of considerations of public policy the ap-

pellant company, being the owner of the premises, must be held to the duty of keeping the coal-hole in question in such condition that it would not entail injury upon anyone who should attempt, while exercising ordinary care, to use the sidewalk, and that this duty was in no wise affected by the fact the basement, including the vault and coal-hole, had been leased for compensation to and was in the possession of a tenant. There was no evidence tending to show the injury was occasioned by reason of any defect or fault in the original construction of the vault, the coal-hole, or the cover to the hole. The negligence on which the right to recover rested was, that the cover of the coal-hole had become insufficient and defective through a failure to keep it in repair. There was evidence tending to show the vault and coal-hole were appurtenant to the basement, only, of the building, and that the basement, including the ²¹⁸ vault and the coal-hole, was, and for some years prior thereto had been, in the exclusive possession of a tenant of the appellant company, who held the same under a lease, wherein he had covenanted that he had received the premises "in good order and condition" and would keep the same in "good repair during the period of the lease." The tendency of this testimony was to establish that the negligence (if any) which caused the injury to appellee was not that of the appellant company. The general rule is, that the occupant of premises is responsible for injuries inflicted upon another by reason of the neglect or failure to keep the premises in repair: *Chicago v. O'Brennan*, 65 Ill. 160; *Gridley v. Bloomington*, 68 Ill. 47; *Boston v. Gray*, 144 Mass. 53, 10 N. E. 509. This court has recognized exceptions to this general rule, as follows: The owner of leased premises may be made liable for such injuries (a) if the covenants of the lease require that he shall keep the premises in repair; (b) if the dangerous or defective condition by which the injury was occasioned existed when the premises were leased; (c) if that which occasioned the injury was a nuisance and was upon the premises when the lease was executed: *Gridley v. Bloomington*, 68 Ill. 47; *Chicago v. O'Brennan*, 65 Ill. 160; *Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683. In the case at bar, the coal-hole was placed in the sidewalk and the vault underneath it constructed with the consent of the city authorities. There is no proof or claim the work of construction was improperly or unskillfully done, or of other grounds upon which to base an insistence the premises were let with a nuisance upon them, or that the coal-hole, or the cover thereto, was in a dangerous or

defective condition when the appellant company parted with the possession and control thereof. The tenant expressly covenanted he would keep the same in good repair, and was in full and exclusive possession of the basement and of the vault under the sidewalk, and, so far as the appellant company is concerned, of the "hole" ²¹⁹ in the sidewalk leading to the vault. Hence the liability of the appellant company cannot be predicated upon any of the exceptions to the general rule which this court has heretofore recognized.

It is contended, however, that another exception should be declared in cases such as this, where the owner of a building is granted the privilege of excavating a vault under the sidewalk of a public street and opening a coal-hole in such sidewalk for the benefit of his premises; that in such instance the owner of the premises assumes, by implication, the duty of keeping the sidewalk where he has opened it in as good condition and as safe for the public use as if the opening had not been made; that such duty is imposed by law for the public safety; and while it is conceded this duty runs with the land, and the alienation of the entire premises, either permanently, by deed, or temporarily, as by a lease, would transfer the duty to the grantee or tenant, still it is urged the conveyance of an undivided interest or demise of a part only of the premises should not be held to relieve the owner of the duty he owes to the public, and to cast the same upon the tenant of a part only of the premises, though the opening in the sidewalk has no relation to any other portion of the building other than that in possession of the tenant. Public safety and sound public policy, it is urged, demand that nothing less than the alienation or parting with the possession of the entire premises should operate to relieve the owner of such premises from the duty which was originally imposed upon and impliedly accepted by him. The view seems to have obtained the sanction of the court of appeals of the state of New York in the case of *Trustees of Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971. We do not regard the case of *Irvin v. Fowler*, 5 Rob. (N. Y.) 482, as also authority for the view. In that case, Fowler, the landlord, and his tenant, were held liable to a stranger for injuries received by falling through a coal-hole in the sidewalk. Fowler, ²²⁰ the owner and landlord, was not in possession, but the coal-hole had been constructed without the consent of the city and constituted a nuisance, and Fowler let the premises

with the nuisance upon them. His case fell within one of the exceptions to the general rule hereinbefore mentioned as recognized in this jurisdiction.

It will be observed the argument and contention of appellee on this point do not go far enough to uphold and sustain the instruction. The instruction, in substance, declares, as a proposition of law, that the owner of property who has obtained a license from the city to excavate a vault under the sidewalk and a scuttle-hole in the sidewalk has the duty imposed upon him to answer for all injuries which may be occasioned thereby to anyone who is injured while attempting, with due care, to pass along the sidewalk, and this liability remains in full force though the owner has leased the property for compensation to a tenant, and delivered over the possession thereof to such tenant. The view of the instruction is, the duty is a continuing duty, and remains in full force as long as the owner of the property is deriving benefits, by way of rent or compensation, from a tenant for the use thereof. This view is clearly erroneous. In the case so much relied upon by counsel for appellee, viz., *Trustees of Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971, where an injury has been occasioned by a fall into a grate over a coal-hole in the sidewalk of a public street, it was said: "Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee. So a lease of the entire premises, and possession thereof to the tenant, would doubtless throw the burden upon the latter: *Shearman and Redfield on Negligence*, 5th ed., secs. 710, 713. The conveyance of an undivided interest, however, would not have that effect, and the demise of a part of the premises should not. The obligation goes with the land, and cannot be discharged by a partial alienation of the land—at least unless the alienation, if ²²¹ for a fixed term, carries with it the exclusive possession of the premises for that term. Entire possession by a tenant from foundation to roof doubtless involves the duty of keeping a grate in front of the premises in repair, which otherwise rests on the owner of the fee. . . . If he parts with the premises, or parts with the possession thereof for a period, the burden falls on his successor in title or possession. If he transfers either title or possession in part only, he does not escape the burden. The implied duty assumed when the hole was cut and the grate placed over it requires reasonable precaution on the part of the owner to pro-

tect the public as long as he remains the owner and is in possession of any part of the building on the abutting land." We are advised of no authority for the view announced in the instruction, that in such cases the owner must answer to anyone injured as long as the owner derives "compensation" for the use of the premises, whether such owner has the control and possession, or the possession or right of control are in another. The instruction conveyed an erroneous proposition to the jury, and we cannot say but that such error contributed to the verdict and judgment against the appellant company.

As the judgment must be reversed and the cause again tried, it is necessary we should declare whether the liability is that of the owner or the occupant, in a case where the occupant is a tenant and has leased a portion only of the premises under covenants which, as between the owner and the tenant, make it the duty of the latter to keep the demised premises and the appurtenances thereto in good repair, and the portion so leased includes a vault under the sidewalk of a public street and a coal-hole opening into the vault, the vault and coal-hole having been constructed with the consent of the city. If the coal-hole and vault were constructed and are used for the benefit of the entire premises, the leasing of a portion only of the premises would not absolve the owner ²²² from his duty to use ordinary care to keep the coal-hole and the covering thereto in a good and safe condition; but if the vault into which the coal-hole opens has no connection with any other part of the building than the basement leased to the tenant, and no benefit inures from it to any other portion of the premises, and the tenant, as against the owner, has, and is entitled to have, exclusive possession and control of the basement, coal-hole, and vault, and has covenanted to keep the same in good repair, then the case should be regarded as within the operation of the general rule that the occupant of the premises, and not the owner thereof, is responsible for injuries received in consequence of a failure to keep the premises in repair.

The judgment of the appellate court and that of the circuit court must be and are each reversed, and the cause remanded to the circuit court for further proceedings not inconsistent with the views here announced.

A License to Construct an Opening in a Sidewalk does not excuse the leaving of such opening uncovered and unguarded: *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E.

424. It is the duty of a property owner who maintains a coal-hole in a city sidewalk in front of his premises to exercise reasonable care in keeping it safe and secure: *Dickson v. Hollister*, 123 Pa. St. 421, 10 Am. St. Rep. 533, 16 Atl. 484.

A Tenant, and not the Landlord, is Answerable when the latter has safely and properly built a coal-vault under or adjoining the sidewalk, with an opening to the surface, and the former, while in exclusive possession of the property, carelessly leaves the coal-hole open whereby one is injured: *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E. 424. So the tenant will be liable to an injured party for failure to keep a scuttle in the sidewalk in repair, if it was in good condition when possession was taken under the lease: *Fischer v. Thirkel*, 21 Mich. 1, 4 Am. Rep. 422. Consult, also, *Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971; *Henson v. Beckwith*, 20 R. I. 165, 78 Am. St. Rep. 847, 37 Atl. 702.

KOHLHOF v. CHICAGO.

[192 Ill. 249, 61 N. E. 446.]

MUNICIPAL CORPORATIONS—SIDEWALKS AND STREETS.—A city has power to designate portions of the streets to be used by horsemen and vehicles, and to reserve other portions for the use of pedestrians exclusively, and to prepare such portions of the streets for such uses respectively. (p. 335.)

MUNICIPAL CORPORATIONS—DUTY AS TO STREETS.—A city is required to maintain only the respective portions of the street, divided into sidewalks and roadway, in a reasonably safe condition for the purposes for which they are respectively devoted. (p. 336.)

MUNICIPAL CORPORATIONS—EXTRAORDINARY USE OF SIDEWALK.—The designation of a portion of the street as a sidewalk does not deprive persons of the right to move goods or articles of personal property from buildings abutting on the street to or from vehicles in the roadway of the street at the edge of the sidewalk, but such use of the sidewalk is not an ordinary use, to accommodate which the city is charged with the duty of constructing and maintaining the sidewalk. (p. 336.)

F. J. Woolley, for the appellant.

A. J. Ryan, city attorney, and J. J. Kelly, for the appellee.

249 **BOGGS, J.** The judgment of the appellate court for the first district reversing and not remanding a judgment in the sum of three thousand dollars, entered in the superior court of Cook county, in favor of the plaintiff in error, in an action on the case ²⁵⁰ brought by the plaintiff in error against the city of Chicago, to recover damages for personal injuries received by an alleged defective sidewalk, contained the following findings of fact:

"And this court finds that the said appellee was injured, as he alleges in the declaration, upon the sidewalk named and described in the declaration, and at the time he therein states. And the court further finds that the breaking of the sidewalk and the injury to appellee were not, nor was either of them, caused by any ordinary use of the said sidewalk, but was the result of its use in an extraordinary and unusual manner—namely, by the moving thereover, by the plaintiff, of an iron safe weighing fourteen hundred pounds. And the court finds that the moving of the safe in question across the sidewalk was not such a use as sidewalks are ordinarily and reasonably intended or used for. And the court finds that the said sidewalk was reasonably safe for use in an ordinary manner; and so the court finds that the said appellant, the city of Chicago, was not guilty of negligence in manner or form as charged in the plaintiff's declaration, and that the plaintiff, was injured by reason of a want of ordinary care upon his part, wherefore this cause is not remanded."

This writ of error brings before us the question whether the principles of law applicable to the facts so recited authorize and warrant the judgment entered by the appellate court.

A sidewalk is that part of a street which the municipal authorities have prepared for the use of pedestrians. The city counsel of the city of Chicago has ample power to designate portions of the streets of the city to be used by horsemen and vehicles, and to reserve other portions of the streets for the use of pedestrians and where horsemen and vehicles may not go, and to prepare such portions of the streets for such uses respectively: City and Village Act, art. 5, sec. 1, cl. 7, 9, 14, 20; *Bloomington v. Bay*, 42 Ill. 503; *Elliott on Roads* ²⁵¹ and *Streets*, secs. 20, 450, 451. All portions of a public street, from side to side, and end to end, are for the public use in the appropriate and proper method, but no greater duty is cast upon the city than that it shall maintain the respective portions of streets in reasonably safe condition for the purpose for which such portions of the street are, respectively, devoted. The right of footmen to cross and pass along and upon the roadway of a street is not here involved, and need not be adverted to.

The designation of a portion of the street as a sidewalk for the use of footmen, and the preparation of the same for such use, do not deprive those who may desire to move goods or articles of personal property from buildings abutting on the

street to or from vehicles in the roadway of the street, at the edge of the sidewalk. The right of footmen to use the sidewalk is superior, however, to such right to move goods or articles to or from the roadway to the building abutting on the street. The use often made of sidewalks in loading or unloading goods or articles is not an ordinary use, to accommodate which the city was charged with the duty of constructing and maintaining the walk. In the opinion filed on petition for rehearing in *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267, we said: "A sidewalk is for the passage of persons only, and we have not had in contemplation any use of it otherwise." In 2 Dillon on Municipal Corporations, section 1019, the rule as to the obligation of cities in respect to streets is thus declared: "It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day; and whether they are so or not is a practical question, to be determined in each case by its particular circumstances."

The findings of the appellate court that "the said sidewalk was reasonably safe for use in an ordinary manner," and that the plaintiff in error was injured by want of ordinary care on his part, are independent findings of ²⁵² material ultimate facts, are binding on this court, negative all imputation of negligence on the part of the city, and preclude recovery by the plaintiff in error.

The judgment of the appellate court is affirmed.

A City Must Keep Its Streets and Sidewalks in a reasonably safe condition: *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412, 49 N. E. 474; *Lorence v. Ellensburgh*, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817. Ordinary care, however, over its streets is the measure of diligence imposed. A municipal corporation is not an insurer against injury to persons using its streets: *Nesbitt v. Greenville*, 69 Miss. 22, 30 Am. St. Rep. 521, 10 South. 452.

Am. St. Rep., Vol. LXXXV—22

PEOPLE v. CENTRAL UNION TELEPHONE COMPANY.

[192 Ill. 307, 61 N. E. 428.]

CORPORATIONS—RIGHT TO USE STREETS.—The right of a corporation to use the streets of a city under an ordinance is a mere license, but becomes a contract when the corporation accepts the privileges and enters upon the use of the streets. Such contract cannot be revoked except for cause. (p. 338.)

PLEADING.—BY REPLYING TO A PLEA after the overruling of a demurrer the right to question the sufficiency of the plea ceases. (p. 339.)

QUO WARRANTO.—THE COURSE OF PLEADING is the same in quo warranto as in other forms of action. (p. 340.)

IN QUO WARRANTO PROCEEDINGS THE ONUS PROBANDI is on the respondent to prove his title as pleaded, or as much of it as is traversed. (pp. 340, 341.)

QUO WARRANTO — REPLICATIONS — DEMURRERS.—If, in quo warranto proceedings, the respondent sets up its charter as a corporation by way of inducement, and concludes with a denial, under the *absque hoc*, of the usurpation charged, replications thereto are subject to demurrer if they traverse the allegations of the inducement instead of the denial. (p. 341.)

QUO WARRANTO—PARTIES.—If an existing corporation abuses any of its franchises or usurps franchises not belonging to it, the information in quo warranto should be against the corporation as such; but if a body of men unlawfully assumes to be a corporation, the information should be against them as individuals. (p. 342.)

QUO WARRANTO—CORPORATIONS.—The effect of filing an information in quo warranto against a corporation by its corporate name, to procure a forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchise, is to admit the existence of the corporation. (p. 342.)

A. C. Ball, state's attorney, and W. C. Graves, for the appellant.

L. G. Richardson and W. B. Mann, for the appellee.

308 **WILKIN, C. J.** This is an information in the nature of a quo warranto, begun in the circuit court of Livingston county by the people on the relation of the city of Pontiac, against the Central Union Telephone Company. The information is by the state's attorney of Livingston county, for the people, and gives the court "to understand and be informed that the Central Union Telephone Company, a corporation, for the space of four months or more now last past, in the county aforesaid, unlawfully has held, and still does hold, without any warrant or right whatever, the use of the streets and alleys of the city of Pontiac

for the purpose of maintaining a system of telephones or telephone exchange in the said city of Pontiac; that the said Central Union Telephone Company, during all the time aforesaid, in the city aforesaid, upon said people has usurped, and still does usurp, the said use of the said streets and alleys of the city of Pontiac, to the damage and prejudice of the said people," etc., whereupon said state's attorney "prays the consideration of the court in the premises, and due process of law against the said Central Union Telephone Company, to make answer to the said people by what warrant it claims to exercise and use the streets and alleys of the said city of Pontiac, as aforesaid." The respondent, the Central Union Telephone Company, filed six pleas. The relator filed a demurrer to each of them, which was sustained to ³⁰⁹ all except the sixth. The relator replied double to the sixth plea, filing four replications thereto. The respondent demurred to each of these replications, and the court held them bad. The relator amended each of the four replications and the respondent moved to strike them from the files, which motion was sustained as to the second and fourth, and overruled as to the first and third, to which ruling both parties excepted. The respondent then demurred to the first and third amended replications, which demurrers were sustained, and the relator having failed to plead over, judgment was entered for the respondent. The relator appeals.

The first error assigned on the record is: "The court erred in striking from the files the plaintiff's second and fourth amended replications to defendant's sixth plea." The second and third question the decision of the court in overruling the demurrer to the sixth plea; the fourth and fifth, in sustaining the demurrer to the first and third replications; the sixth, in not carrying defendant's demurrer to the first and third amended replications back to the sixth plea and sustaining the same; and the seventh, in entering judgment in favor of the defendant on the sixth plea. The second amended replication is almost a literal copy of the first, and the fourth is exactly, in legal effect, like the third. They serve no other purpose than to further encumber an already unnecessarily voluminous record, and were properly stricken from the files. As counsel suggest, the court might have required the party to elect on which it would proceed and struck out the others, but it was not bound to follow that practice: *Parks v. Holmes*, 22 Ill. 522.

After the demurrer to the sixth plea was overruled the relator took leave and replied to it. The demurrer was thereby waived: 1. Because no motion was made to carry the demurrer back to the plea; and 2. Because, by pleading over after demurrer, the right to question the sufficiency of the plea ceased. It is not permissible ³¹⁰ to plead and demur at the same time: *Culver v. Third Nat. Bank*, 64 Ill. 528, and cases there cited.

The sixth plea set up: 1. The incorporation, under the general incorporation law of the state of Illinois, of the Central Telephone Company; 2. An ordinance of the city of Pontiac granting it the right to use the "streets, sidewalks, alleys, and public grounds of the city for the use and purposes then and there to erect, maintain, and use, all the necessary poles or posts, of wood or iron, or other substance, material, and the necessary wires to successfully operate and use a system of telephones or a telephone exchange in the city of Pontiac"; 3. The organization of the defendant, the Central Union Telephone Company, under the same laws of the state; 4. That, on the twenty-ninth day of June, 1883, the first-named company granted, bargained, sold, and conveyed to the latter "all its property, assets, licenses, contracts, concessions, and all documents, correspondence, and papers; all property rights, legal or equitable, credits and rights of action; all telephone exchange wires, poles, insulators, switchboards, batteries, instruments, and machines; all tools, and articles of every description; all right, title, and interest in any contract, license, or privilege, or property of whatever description"; 5. That the Central Telephone Company accepted the license under the ordinance first named, and that the defendant, upon the assignment and conveyance to it of the property, etc., of the Central Telephone Company, entered upon the use of the streets and alleys of the city of Pontiac, and from thence hitherto has continued to use them for the purpose of operating a telephone system, etc.; and 6. That, on the seventh day of April, 1899, the city of Pontiac adopted and approved an ordinance granting the right and privilege to the defendant to use certain streets and alleys of the city for the purpose of extending its telephone system in said city. This plea sets up other facts by way of inducement, and concludes: "Without this, that the ³¹¹ Central Union Telephone Company has usurped, or now does usurp, the use of the streets and alleys, liberties, privileges, and franchises aforesaid. or any or either

of them, upon the said people as by the said information is above supposed; all of which matters and things this defendant is ready to verify, as the court shall consider, whereupon it prays judgment," etc.

It is true, as said by counsel for the relator, that the grant by the city of Pontiac of the right to use the streets, etc., is not a franchise, but a license or contract; but it is equally clear that when the corporation accepted the privileges and entered upon the right to use the streets, etc., it became a binding contract between the city and company, which could not be revoked or rescinded except for cause: *Chicago Municipal Gas Light Co. v. Lake*, 130 Ill. 42, 22 N. E. 616; *Chicago City Ry. Co. v. People*, 73 Ill. 541; *Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 584.

It is suggested in the argument that the Central Telephone Company could not assign the license granted to it to the defendant. That, perhaps, would have been true but for the terms of the ordinance to the first company, which grants the privilege to the "Central Telephone Company and its successors and assigns."

The principal question in the case is whether the circuit court properly sustained the demurrers to the first and third replications. These replications attempt to traverse the inducement to the sixth plea, the first being a denial of each and every one of the allegations of that plea, and the third, counsel admit, "not only specifically traverses the inducement in the sixth plea, but also sets up new matter," etc. We have frequently held that under our statute the course of pleading is the same in quo warranto as in other forms of action, and, in fact, the statute itself so provides: *Hurd's Stats. 1899, c. 110, sec. 10, p. 1285*. The onus probandi generally lies on the defendant, who must prove his title as pleaded, ²¹² or such part of it as is traversed: *Chicago City Ry. Co. v. People*, 73 Ill. 541; *People v. Bruennemer*, 168 Ill. 482, 48 N. E. 43; *Distilling etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; *Independent Medical College v. People*, 182 Ill. 274, 55 N. E. 345. We said in *People v. Pullman's Car Co.*, 175 Ill. 125, 51 N. E. 664 (on page 135 of 175 Ill. and page 667 of 51 N. E.): "Each of the amended pleas, as already stated, sets out the charter of the defendant, and then alleges certain matters of inducement, and concludes with a traverse under the absque hoc. The design of a special traverse, as distinguished from a common traverse, is to ex-

plain or qualify the denial. The essential parts of such a plea are the inducement, the denial, and the verification. The issuable part of the plea is the denial, which is under the *absque hoc*, and when the denial under the *absque hoc* is sufficient, no issue of fact can be formed upon the inducement."

In *People v. Spring Valley*, 129 Ill. 169, 21 N. E. 843, the information was against the city of Spring Valley and Charles J. Devlin, as mayor of said city, and charged that the city was then exercising, and for three months past had exercised, without any warrant, etc., municipal powers of every kind and nature conferred by an act to provide for the incorporation of cities and villages from certain specified territory, etc. The defendant filed a plea, in which it was attempted to set up the various steps taken for the organization of the city, as required by the statute. To this plea the people filed several replications, by some of which they traversed the allegations of the plea as to the organization of the city. A demurrer to these replications was sustained. In passing upon that ruling of the court we said (129 Ill. 175, 21 N. E. 844): "The demurrers to the replications were properly sustained. The first replication was a general denial of the legal incorporation of the city. The second, third, and fourth were specific denials of particular facts necessary to constitute such legal incorporation. The fifth, sixth, and seventh charged that the incorporation was illegal and void by reason of the fraudulent means put forth to secure it. ²¹³ In substance, therefore, all the replications attacked the existence of the city of Spring Valley as a corporation. But this was a departure from the information, or, if not a technical departure in pleading, it amounted to a contradiction of the information by the replications, because the information, by making the city of Spring Valley a party defendant, thereby admitted its existence as a corporation. When an existing corporation abuses any of its franchises or usurps franchises which do not belong to it, the information should be against the corporation, as such; but when a body of men or a number of individuals unlawfully assume to be a corporation, the information should be against them as individuals, and not by their corporate name. Dillon, in his work on Municipal Corporations, volume 2, third edition, section 895, says: 'It is held in England that if the information be for usurping a franchise by a corporation, it should be against the corporation, but if for usurping the franchise to be a corporation it should be against the particular persons

guilty of the usurpation': Citing cases. It is there further said: "The weight of authority in this country 'may now be regarded as sustaining the proposition that the effect of filing an information against a corporation by its corporate name, to procure a forfeiture of its charter or to compel it to disclose by what authority it exercises its corporate franchise, is to admit the existence of the corporation. When, therefore, the information is filed against the respondent in its corporate name, and process is issued and served accordingly, and the respondent appears and pleads in the same corporate character, its corporate existence cannot afterward be controverted'": Citing High on Extraordinary Legal Remedies, 2d ed., sec. 661, and other authorities.

The replications under either of these views, were clearly obnoxious to the demurrer, and the court properly sustained it.

The judgment of the circuit court will be affirmed.

The Pleadings in Quo Warranto must conform, as far as possible, to the general principles governing ordinary civil actions: Distilling etc. Co. v. People, 156 Ill. 448, 47 Am. Rep. 200, 41 N. E. 188. But see the note to People v. Rensselaer etc. R. R. Co., 80 Am. Dec. 51.

The Defendant in Quo Warranto must either disclaim or justify. If he justifies he must set out his title specially: Distilling etc. Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; monographic note to People v. Rensselaer etc. R. R. Co., 80 Am. Dec. 52.

An Information in Quo Warranto to oust the defendants from acting as a corporation, and to test the fact of incorporation, should be filed against the individuals; but if the object is to effect the dissolution of a corporation, or to oust such corporation of some franchise which it unlawfully exercises, then the information is correctly filed against the corporation: People v. Rensselaer, 15 Wend. 113, 80 Am. Dec. 83, and note. An information against the corporation admits the existence of the corporation: People v. Rensselaer etc. R. R. Co., 15 Wend. 113, 80 Am. Dec. 83. See, in this connection, People v. Montecito Water Co., 97 Cal. 276, 88 Am. St. Rep. 172, 82 Pac. 236.

CARROLL v. TOMLINSON.

[192 ILL. 399, 61 N. E. 484.]

CONVEYANCES — TRANSACTION, WHETHER MORTGAGE.—If the owners of an equity of redemption execute a quitclaim deed thereof to the mortgagee, who gives back a bond agreeing to convey the premises to them upon payment of a specified sum at a certain date, the transaction does not constitute a mortgage. (p. 345.)

CONVEYANCES.—A BOND FOR A DEED IS NOT FORFEITED by the failure of the obligee to pay the principal at a time specified, if the obligor extends the time of payment first agreed upon. (p. 345.)

CONVEYANCES—BOND FOR DEED—ACCOUNTING FOR RENT.—An obligor in a bond for a deed who has leased the premises under agreement to apply the rent on the bond has no right, without the consent of the obligee, to release the tenant from a part of the rent, and he is chargeable therewith if he could, by reasonable diligence, have collected such rent. (p. 346.)

COSTS IN CHANCERY CASES are ordinarily in the discretion of the court. (p. 346.)

Bassett & Bassett and R. L. Watson, for the appellants.

J. M. Brock, for the appellee.

400 CARTWRIGHT, J. On March 3, 1898, Edwin H. Carroll, one of the appellants, held a mortgage upon one hundred and twenty acres of land in Mercer county, executed by William A. Kincaid and wife, August 12, 1895, to secure a note for two thousand four hundred dollars with interest at seven per cent. Kincaid and wife had conveyed the equity of redemption to Alfred Tomlinson, the appellee, and Otis Whan. The interest was in arrears and Carroll was insisting upon payments being made to reduce the amount due, or upon further security. Negotiations were begun, which culminated March 10, 1898, in an agreement, by which Tomlinson and Whan conveyed said equity of redemption by quitclaim deed, to said Edwin H. Carroll, who, with his wife, Caroline Carroll, the other appellant, gave them a bond conditioned for the conveyance of said property to Tomlinson and Whan upon the payment of a certain sum on January 1, 1899, with interest at seven per cent. On December 31, 1898, Whan conveyed all his interest in the land to the appellee, Tomlinson, who filed the bill in this case January 30, 1901, against said appellants and William T. Lee, a tenant, alleging a tender to appellants of the amount due according to the terms of the bond and a re-

fusal by appellants to receive the same. The money tendered was brought into court, and the prayer was for a decree that appellants should convey the premises to appellee according to the terms of the bond. Lee was ⁴⁰¹ defaulted and the bill was answered by appellants, who insisted that the bond had been forfeited and that the amount tendered was not sufficient to pay the amount due. The court heard the evidence of the parties and found for the appellee, and decreed that the appellants should convey to him, by quitclaim deed, all interest in the premises upon payment of the amount found due by the court, which was tendered in open court and refused and left with the clerk of the court. The costs were adjudged against the appellants, and they appealed.

The bill alleged that the deed by the complainant, Tomlinson, and his cotenant, Whan, to Edwin H. Carroll, was intended by the parties to be a security for the amount then due on the mortgage and certain sums paid for taxes and redemption from tax sale and expenses, and that the conveyance and bond amounted to a mortgage. It is insisted that the transaction did not have the character of a mortgage, but that it was a conveyance with an agreement to reconvey, which might be forfeited for noncompliance with the terms of the bond. There was no agreement on the part of the complainant and Whan to do anything or to pay any money, and the bond did not secure any debt. A mortgage is security for a debt or obligation and an incident thereto, and it is therefore held that a debt or obligation of some kind is an essential element in a mortgage: *Rue v. Dole*, 107 Ill. 275; *Burgett v. Osborne*, 172 Ill. 227, 50 N. E. 206. The bond merely provided that if the complainant and Whan should pay a certain sum, with interest and taxes, the obligors would convey the premises. There was no liability which the makers of the bond could enforce, and no debt or obligation. The conveyance and bond did not amount to a mortgage, but the bill set out the transaction and the instruments executed by the parties, and was so framed as to authorize a decree for a specific performance.

In the next place, it is contended that the complainant was not entitled to a specific performance because ⁴⁰² the bond had been forfeited. When the money was due by the terms of the bond, complainant paid Edwin H. Carroll five hundred dollars, and it is conceded that the time was then extended to September 1, 1899. There were further agreements for extension, but it is contended that Carroll never agreed to

extend the principal sum beyond March 1, 1900. Time was made of the essence of the contract, but Carroll waived the provision so far as the first extension was concerned, and it is clear that afterward, while he was anxious to collect the interest, he was unwilling to receive the whole amount. He wrote several letters during 1900, and as late as the last of November he objected to receiving the principal, which would probably be idle in his hands until the next spring. In these letters he was insisting upon the payment of the seven per cent interest, and, at the same time, was unwilling to take the principal when he could not realize the same rate of interest or perhaps the money would be idle. The evidence failed to show that there was any forfeiture.

It is next contended that the court did not ascertain correctly the amount due. The bond had been lost or mislaid and its contents were proved by the testimony of witnesses. They differed slightly as to the amount, and we see no reason to differ with the court in its conclusion. The principal thing complained of is, that the court charged the defendant, Edwin H. Carroll, with three hundred and sixty dollars as rent collected, when he only collected two hundred dollars. By agreement he had possession of the land from March 1, 1898, to March 1, 1899, and was to rent the land and apply the rent on the bond. He rented it to one Swanson for three hundred and sixty dollars, payable March 1, 1899. The land was overflowed and a good part of the crops was lost, and he, deeming it equitable to the tenant, threw off fifty dollars of the rent. Of the remaining three hundred and ten dollars, two hundred dollars was paid to him. The evidence showed that the tenant was good and that the rent could have been collected. It was, perhaps, a hardship for the tenant to pay the rent under the circumstances, but the ⁴⁰³ obligation to pay was not affected thereby, and Carroll had no right to release a part of the rent without the consent of those beneficially interested. He did not show that he could not, by reasonable effort, have collected the rent, and he was chargeable with it if he could by reasonable diligence have collected it: *Jackson v. Lynch*, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246.

It is further objected that the costs should not have been adjudged against the defendants because there was no allegation in the bill that the complainant was willing and ready to pay all that was due on the bond. The bill alleged that he offered to pay all that was afterward found due by the court,

and the amount tendered was sufficient to pay the debt, with the exception of what the defendant, Edwin H. Carroll, had paid to the county clerk to redeem from a sale of the land to complainant for taxes. Complainant had bought the land at a tax sale, but he was bound to pay the taxes, and his payment by purchase was not different from any other payment. The purchase was worth nothing against Carroll and he was not called upon to redeem from it. Inasmuch as he had done so, the court required Tomlinson to refund the amount in addition to the amount due on the bond. Costs in chancery cases are ordinarily in the discretion of the court, and we do not think the discretion was abused in this case.

Finally, it is urged as error that the cause was not referred to a master in chancery to state an account. There was no such general account as required a reference. There was nothing to be done but to compute interest and a few payments on the bond and the amount paid to redeem from the tax sale. We perceive no error in the decree, but think the equities were with the complainant, and that the decree was right.

The decree is affirmed.

Mortgage.—Any deed or written contract used by the parties to pledge real estate as security for a debt or obligation, which, though informal and insufficient as a common-law mortgage, by its terms shows that the parties intended it should operate as a lien, may constitute a mortgage in equity: See the monographic note to *Hutzler v. Phillips*, 4 Am. St. Rep. 696. But a mortgage without any debt, liability, or obligation secured by it can have no present legal effect as an encumbrance on the land: *Ladue v. Detroit etc. R. R. Co.*, 13 Mich. 380, 87 Am. Dec. 759. A deed absolute on its face may be shown to be a mortgage: *McFarlane v. Loudon*, 99 Wis. 620, 67 Am. St. Rep. 883, 75 N. W. 394; *Peck v. Girard etc. Ins. Co.*, 16 Utah, 121, 67 Am. St. Rep. 600, 51 Pac. 255; *Glass v. Hieronymus*, 125 Ala. 140, 82 Am. St. Rep. 225, 28 South. 71. An equitable mortgage arises whenever a writing shows a clear agreement to make property a security for an obligation mentioned therein: *Dulaney v. Willis*, 95 Va. 606, 64 Am. St. Rep. 815, 29 S. E. 324.

Costs in Equity may be awarded or withheld in the discretion of the chancellor: *Pile v. Pedrick*, 167 Pa. St. 296, 46 Am. St. Rep. 677, 31 Atl. 646, 647; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Pearce v. Chastain*, 3 Ga. 226, 46 Am. Dec. 423; *Blue v. Blue*, 38 Ill. 9, 87 Am. Dec. 267; *Guernsey v. Phinixy*, 113 Ga. 808, 84 Am. St. Rep. 270.

GUNDLACH v. SCHOTT.

[192 ILL. 509, 61 N. E. 832.]

MASTER AND SERVANT—ASSUMPTION OF RISKS.—Although a servant has some knowledge of attendant danger, his right of recovery is not defeated if, in obeying the order of his master to proceed with the work which results in his injury, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances, and whether he has so acted is a question of fact to be determined by the jury. (p. 349.)

TRIAL.—SPECIAL INTERROGATORIES ARE PROPERLY REFUSED if they do not pertain to the ultimate fact in issue, or assume an evidentiary fact as proven. (p. 350.)

EVIDENCE—EXPERTS.—Whether the operation of machinery by a twisted belt is dangerous is not a matter of common knowledge, and expert testimony is admissible on that subject. (p. 350.)

Wise & McNulty and Winkleman & Barr, for the appellants.

Webb & Webb and G. A. Koerner, for the appellee.

510 WILKIN, C. J. This is an appeal from a judgment of the appellate court for the fourth district affirming a judgment rendered in an action on the case for a personal injury, in the circuit court of St. Clair county, in favor of appellee, for seven thousand dollars, against appellants.

The declaration contained four counts, but the cause was submitted to the jury upon the third count only, the jury having been directed, at the close of appellee's evidence, to find for appellants as to the first, second, and fourth counts. The third count charges, in substance, that on the 8th of September, 1899, appellants were owners of and conducting a foundry, where parts of machinery were manufactured, a part of the foundry appliances being a machine for polishing castings, called a "rattle-box"; that this rattle-box was operated by means of a leather belt running upon two pulleys; that the castings were polished by being placed in this rattle-box; that plaintiff's duty was to put the castings into the box and remove them when finished, starting and stopping the machine by putting on and throwing off the belt; that on this date the belt had been improperly sewed together, "leaving a twist in the same, thereby rendering it very difficult and dangerous to adjust it on said top pulley, of all of which the defendants had full and complete notice; that defendants then and there, after having notice of the dangerous and imperfect condition of said belt.

ordered, directed, and instructed plaintiff to use it in said condition, informing plaintiff that the same was safe, sufficient, and not dangerous"; that, while plaintiff was, with due care on his part and without knowledge of any ⁵¹¹ danger, and in obedience to the instruction and direction of defendant, putting on the belt, his left hand and arm came in contact with the twist in the belt, "by means of which said negligence of the defendants in furnishing the imperfect and dangerous belt with which plaintiff was to work, and their negligence in ordering and directing plaintiff as aforesaid, he was injured," etc.

Appellee's account of how he received the injury is abstracted by appellants' counsel from his testimony, as follows: "When Mr. Rompel sewed the belt together he told me it was all right—to go ahead and put it on. I called his attention to the twist. His answer was, it was all right—to go ahead. I did not know there was any danger putting it on that way. I was standing with both feet on the window sill. The window sill is somewhat over three feet from the ground. I had to put on the belt. I raised the belt up with my right hand and braced myself with my left hand against the shaft, which was revolving. When I threw the belt up there I had to push it with my left hand, because the belt was heavy. I put the belt on with my right hand and took my left hand and helped to put it on, and the twist came up and threw the twist right over very quickly and caught my fingers, and I could not get them away any more. I tried my best to get them away. It threw me up to the roof two times, and when I hit the roof I slipped back, and I thought I would get killed, and it threw me up against the roof, and I threw myself back so I would not go around the pulley; then I came up again and threw myself back, and then I fell to the ground and my arm was torn off."

The first assignment of error upon this appeal is, that the trial court erred in refusing to give a peremptory instruction to find for the defendants, asked at the close of plaintiff's evidence and again at the close of all the evidence. This contention is based upon the theory that plaintiff well knew the danger incident to his attempting to place the belt upon the pulley, and must be held to ⁵¹² have assumed it; and it is said that even if plaintiff discovered a twist in the belt and called appellants' attention to it, and was told "it is all right," yet this was neither such a command nor assurance of safety as would release plaintiff from the assumed risk or free him from contributory negligence. Plaintiff testified his employer said: "It

is all right; go ahead and put it on." It is well settled that even though the plaintiff knew of the defect, if the master ordered him to proceed with the dangerous work he did not assume the risk of so doing unless the danger was so manifest that a person of ordinary prudence and caution would not have incurred it. "Even if the servant has some knowledge of attendant danger, his right of recovery will not be defeated, if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances. When the master orders the servant to perform his work, the latter has a right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary perils. The servant has a right to rest upon the assurance that there is no danger, which is implied by such an order. The master and servant are not altogether upon a footing of equality. The primary duty of the latter is obedience, and he cannot be charged with negligence in obeying an order of the master unless he acts recklessly in so obeying. Whether he acted thus recklessly in obeying his master's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury": *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651. Under the evidence in this record it was clearly a question to be submitted to the jury whether the danger was of the character mentioned, and no error was committed in refusing the peremptory instruction.

Appellants next contend the court erred in refusing to submit to the jury the following interrogatories: "1. Was ⁵¹³ the plaintiff instructed not to put the belt on the upper pulley while the upper pulley was running rapidly? 2. Was the plaintiff injured because, in violation of his instructions, he attempted to put the belt on the upper pulley while said pulley was running rapidly?" Under the third count the negligence charged, and upon which the case was submitted to the jury, was "in furnishing the imperfect and dangerous belt with which plaintiff was to work," and defendants' "negligence in ordering and directing plaintiff" to use it in that condition. It is apparent that the first of these interrogatories did not pertain to the ultimate fact to be found by the jury; and the second interrogatory, in addition to being subject to the same criticism, assumed as true an evidentiary fact. Both of the interrogatories were therefore improper.

Appellants contend the court improperly admitted the evidence of certain witnesses who undertook to give their opinions as to whether the manner of constructing the belt around the pulley was reasonably safe for the person operating the machine, it being urged that this testimony falls under the rule that even an expert should not be allowed to give an opinion where all the facts upon which the opinion is based can be made sufficiently intelligible to the court and jury. Whether this machinery, operated, as it was, with the twisted belt, was dangerous, clearly was not a matter of common knowledge, and therefore plain and open to the jury. When the facts upon which opinions are founded cannot be ascertained and made intelligible to the court and jury, the opinions of witnesses may be received: *Chicago v. McGiven*, 78 Ill. 347; *Illinois Central R. R. Co. v. People*, 143 Ill. 434, 33 N. E. 173. To say the least, it was not a matter of so common knowledge to the jury that it can be said the trial court committed error in permitting the introduction of the expert testimony. In many cases it may be difficult to say whether or not the construction of a machine is so intricate that a jury cannot be made to fully understand ⁵¹⁴ it without admitting the opinions of experts, and the court must, therefore, often exercise a discretion to determine when such evidence may be heard.

As to the complaint that improper remarks were made by counsel for appellee when the jury was being selected, it is only necessary to say that the court admonished the jury not to be influenced by it, and, in effect, reprimanded counsel for making the remark. It seems to have referred to some one, acting as the agent of an insurance company, having attempted to compromise the suit. There is nothing whatever to show that the jury were in any way influenced by what was said, to the prejudice of the defendant. We find no error in the instructions given.

The judgment of the appellate court will be affirmed.

A Servant Assumes the Risk of obvious dangers connected with his employment: *Lamson v. American Axe etc. Co.*, 177 Mass. 144, 83 Am. St. Rep. 267, 58 N. E. 585; *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200, 27 N. E. 502. But he assumes only such risks as are ordinary, obvious, or known and incidental to the employment: *Illinois Steel Co. v. Bauman*, 178 Ill. 351, 69 Am. St. Rep. 316, 53 N. E. 107. He takes the risk of known dangers, but not of others: *Myers v. Hudson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631. The rule as to the assumption of risks is, that the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with

instrumentalities adequately safe for his use: *Konold v. Rio Grande etc. Ry. Co.*, 21 Utah, 379, 81 Am. St. Rep. 693, 60 Pac. 1021. Master and servant do not stand upon equal footing, even when they have equal knowledge of danger: *Shortel v. St. Joseph*, 104 Mo. 114, 24 Am. St. Rep. 317, 18 S. W. 397; and the servant has a right to rely on his employer's care and knowledge, and to assume that he has taken all reasonable precautions to guard him from danger, and will not expose him to unnecessary risk: *Faren v. Sellers*, 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 South. 363; *Starr v. Kreuzberger*, 129 Cal. 123, 79 Am. St. Rep. 92, 61 Pac. 641.

MAYER v. PICK.

[192 Ill. 561, 61 N. E. 416.]

JUDGMENTS—CONFESSION OF.—A joint warrant of attorney to confess judgment does not authorize a several judgment against the surviving maker of a joint and several note. (p. 353.)

JUDGMENTS.—POWER TO CONFESS A JUDGMENT must be clearly given and strictly pursued, or the judgment is void. (p. 355.)

JUDGMENT—CONFESSION OF—VALIDITY.—A confession of judgment under a joint warrant of attorney against the surviving maker of a joint and several note, taken before the note is due, is void, and must be vacated on motion. (p. 356.)

A. H. Meads, for the appellant.

Kraus & Holden, for the appellee.

562 PER CURIAM. When this case was decided by the appellate court for the first district the following opinion of that court by Adams, P. J., was rendered:

"January 16, 1900, judgment by confession was rendered in favor of appellant, and against appellee, on the following promissory note and by virtue of the following warrant of attorney:

563 "\$2,000.

Chicago, Ill., August 22, 1899.

"'On or before one year after date, for value received, we jointly and severally promise to pay to the order of ourselves the sum of \$2,000, with interest thereon at the rate of six per centum per annum, after date, until paid, payable semi-annually. Both principal and interest are payable in gold coin of the United States of America of the present standard of weight and fineness, at the banking office of Leopold Mayer & Son, Chicago.

"'It is an express condition of this note that in case of default in the payment of the interest, or any part thereof, to

accrue thereon when due, the principal sum of this note shall, at the option of the legal holder hereof, at once become absolutely due.

“The payment of this note is secured by a deed of trust to Nathaniel A. Mayer, of even date herewith, on real estate in Cook county, Illinois. And to further secure the payment of said amount, we hereby authorize, irrevocably, any attorney of any court of record to appear for us in such court, in term time or vacation, at any time after date hereof, and confess a judgment without process in favor of the legal holder of this note, for the amount unpaid upon said principal note, with interest thereon up to the day of entering such judgment or any part thereof, together with costs and \$40 attorneys’ fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof.

SIMON PICK.

“MINA PICK.

“Indorsed:

“SIMON PICK.

“MINA PICK.’

“An execution was issued on the judgment and was returned no part satisfied. February 3, 1900, the court, on motion of appellee’s attorney, vacated the judgment and quashed the execution, with leave to appellee to plead instanter. Appellee demurred to appellant’s declaration, and the court sustained the demurrer and dismissed the suit at appellant’s costs. From the judgment so rendered this appeal was taken.

“It appearing by the declaration that the note was not due until about seven months after the time of filing the ⁵⁶⁴ declaration, the court, looking solely to the declaration, could not do otherwise than sustain the demurrer. The main question, therefore, is whether the court erred in vacating the judgment.

“It was admitted on the motion to vacate the judgment that Simon Pick, whose name is signed to the note and warrant of attorney, died January 3, 1900. While the note is, in terms, the joint and several note of the makers, the warrant of attorney is clearly joint. The language is: ‘We hereby authorize any attorney of any court of record to appear for us in such court, in term time or vacation, at any time after date hereof, and confess judgment,’ etc. We are of opinion that the warrant of attorney, being joint, does not authorize a several judgment against one of the makers: *Gee v. Lane*, 15 East, 592; *Man-*

ufacturers' etc. *Bank v. St. John*, 5 Hill, 497; *Hunt v. Chamberlain*, 8 N. J. L. 336, 14 Am. Dec. 427; *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739; *Frye v. Jones*, 78 Ill. 627; *Whitney v. Bohlen*, 157 Ill. 571, 42 N. E. 162; *Blake v. State Bank of Freeport*, 178 Ill. 182, 52 N. E. 957.

"*Gee v. Lane*, 15 East, 592, seems to be the leading case on the subject. In that case there was a joint and several bond. The warrant of attorney was executed by the obligors, John Lane and William Gee, and was as follows: 'To appear before us, John Lane and William Gee, and to receive a declaration for us in an action of debt for two thousand four hundred pounds, upon a certain bond bearing even date herewith, whereby the said John Lane and William Gee are jointly and severally become bound to the said Thomas Gee in the penal sum of two thousand four hundred pounds, and thereupon to confess the same action, or else to suffer judgment by nil dicit to pass against us in the said action,' etc. William Gee having died, the obligee moved for leave to enter up judgment against Lane, the survivor, but the court denied the motion, Lord Ellenborough, C. J., saying: 'An action to be brought against us must mean a *joint* action. In the case cited, the warrant of attorney executed by the two was to enter judgment against *me*, which, construed severally, might serve ⁵⁶⁵ the purpose; but I am afraid that an authority by two to enter judgment in an action against us will not warrant a judgment against one alone. The authority must be pursued; we cannot violate it.'

"In *Hunt v. Chamberlain*, 8 N. J. L. 336, 14 Am. Dec. 427, the bond was executed by two obligors and was joint and several. The warrant of attorney was to any attorney to appear to an action to be brought against us. After the death of one of the obligors judgment by confession was entered against the other. The court, following *Gee v. Lane*, 15 East, 592, reversed the judgment, and say, in substance, that the king's bench has uniformly adhered to the decision in *Gee v. Lane*, 15 East, 592, and that the court of common pleas has followed that decision since the year 1751. The court further say: 'The present warrant empowers an attorney to appear in an action against Daniel Hunt and Ralph Hunt both, and extends no further. Its language is: "To an action to be brought against us, and confess judgment against us." They were willing to stand *together* in judgment and to meet an execution by their joint means and exertions, but it gives no authority for placing one of them in judgment by *himself*, and leaving him all alone to breast an ex-

ecution for the whole sum, while the means and estate of the other remain untouched and undisturbed.'

"In *Manufacturers' etc. Bank v. St. John*, 5 Hill, 497, the warrant was signed by three persons, and the power was 'to appear for *us and each of us*,' in an action of debt 'to be brought against *us and each of us*,' and to confess judgment 'against *us and each of us*,' and the court, Bronson, J., delivering the opinion, says: 'I am strongly inclined to the opinion that the warrant will only authorize a joint judgment against all the obligors.'

"In *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739, the promissory note and warrant of attorney were executed by Lesser and another, and were both joint, the power being, 'to enter our appearance before any court of record, in term time or in vacation, in any of the states or territories of the United ~~560~~ States, at any time after the said note becomes due, to waive the service of process and confess judgment in favor of the said Simon Kahn or his assigns.' It will be observed that the warrant was substantially the same as in the present case. The supreme court of Wisconsin held that a judgment against Lesser alone was not authorized by the warrant, and was void, citing numerous cases, and say: 'It is well settled that the authority to confess a judgment under a warrant or power of attorney must be strictly construed. An instrument delegating such power is ordinarily subjected to a strict interpretation, and the authority will not be extended beyond that given in terms, or which is necessary to carry into effect what is expressly given': Citing numerous authorities.

"In *Frye v. Jones*, 78 Ill. 627, the court say: 'The authority to confess a judgment must be clear and explicit, and must be strictly pursued': Citing *Manufacturers' etc. Bank v. St. John*, 5 Hill. 497, and *Chase v. Dana*, 44 Ill. 262.

"In *Whitney v. Bohlen*, 157 Ill. 571, 42 N. E. 162, the power granted was 'to appear for me and confess judgment against me as of any term,' etc. Judgment was entered by confession in vacation, and the court held the judgment unwarranted, saying, among other things: 'It is conceded the power to confess a judgment must be clearly given and strictly pursued, or the judgment will be void': Citing prior Illinois decisions. See, also, *Blake v. State Bank of Freeport*, 178 Ill. 182, 52 N. E. 957, in which this language was used: 'If a judgment so entered was not confessed by authority of the defendant, it will be void

for want of power to confess it, and a defendant who is injured by it may have it set aside upon motion.'

"Other cases might be cited to the same effect, but it is sufficient to say that the great preponderance of authority, English and American, is opposed to the proposition that a judgment may be confessed against one of two or more persons by virtue of a joint warrant of attorney ⁵⁰⁷ authorizing, in terms, a judgment only against all executing the warrant.

"January 16, 1900, when the action was commenced and the unwarranted judgment entered, appellant was not entitled to recover on the note, irrespective of a warrant to confess judgment, because the note, by its terms, did not become due until about seven months thereafter. There is no principle, legal or equitable, by which one can be required to pay money before it becomes due in accordance with his contract. A judicial determination so requiring would be in violation of the contract."

For the reasons given, the appellate court properly affirmed the judgment. After a careful examination of the case we are of the opinion that the case was correctly decided below, and, coinciding with the views expressed by the appellate court, we adopt its opinion as our own.

The judgment of the appellate court is affirmed.

A Warrant of Attorney to Confess Judgment must be construed strictly: *Spence v. Emerine*, 46 Ohio St. 433, 15 Am. St. Rep. 634, 21 N. E. 866. See, also, *Estate of Olaghorn*, 181 Pa. St. 600, 59 Am. St. Rep. 680, 37 Atl. 918; *Little v. Dyer*, 138 Ill. 272, 32 Am. St. Rep. 140, 27 N. E. 905. A warrant executed by two parties in their individual names, if not sufficient to authorize the confession of a judgment against them in their firm name, can be objected to only by them, and not by the creditors of the firm: *Farwell v. Huston*, 151 Ill. 239, 42 Am. St. Rep. 237, 37 N. E. 864. See the note to *Lee v. Figg*, 99 Am. Dec. 275-278, on this subject.

ARMS v. AYER.

[192 Ill. 601, 61 N. E. 851.]

CONSTITUTIONAL LAW.—IF THE PROPER CONSTRUCTION of a statute is doubtful, courts must resolve the doubt in favor of the validity of the law. (p. 357.)

CONSTITUTIONAL LAW.—LAWS MUST BE COMPLETE in all their terms and provisions when they leave the legislative branch of the government, and nothing must be left to the judgment of the delegate of the legislature. (p. 358.)

CONSTITUTIONAL LAW—DELEGATION OF POWERS. The fact that the inspector of factories is given a discretion as to the number, location, material, and construction of fire-escapes in buildings under a statute relating thereto does not render it unconstitutional as delegating legislative or judicial power to such inspector. (p. 359.)

JUDICIAL POWER UNDER STATUTES is never extended to cases of the exercise of judgment in the execution of a ministerial power. (p. 359.)

CONSTITUTIONAL LAW—TITLE OF STATUTES.—A constitutional provision requiring statutes to embrace in their title but one subject, which shall be expressed in the title, is complied with if the general object of an act is so expressed. It is not to be expected, nor is it possible, for the title of the act to contain all the various provisions of the act itself. If such were the case, the title of the act would have to be as comprehensive as the act itself. (p. 359.)

CONSTITUTIONAL LAW — FIRE-ESCAPES — GENERAL LAW.—A statute providing that all buildings "four or more stories in height, excepting such as are used for private residences exclusively," and "that all buildings more than two stories in height used for manufacturing purposes" shall have fire-escapes, is a general, and not a local or special, law. (p. 360.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—It is sufficient, under a constitutional provision prohibiting local or special legislation, if a law applies to all persons in like situation, and to all subjects of the same class or degree. (p. 360.)

FIRE-ESCAPES.—DUTY TO PROVIDE buildings with fire-escapes required by statute rests primarily upon owners of buildings, and the liability resulting from its nonperformance does not depend upon the serving of notice to erect such fire-escapes. (p. 361.)

L. Evans, for the appellant.

Smoot & Eyer, S. S. Page, and F. P. Snyder, for the appellees.

¶10 WILKIN, C. J. The argument in this case is mainly upon the constitutionality and validity of the act of 1897, and we shall confine our consideration of the case to that question. We see no substantial objection to at least some of the counts on the special demurrer.

The first objection made to the statute by counsel for appellees is, that it imposes legislative power upon the inspector of factories, in that it authorizes him to determine how many, and in what position, fire-escapes shall be placed, etc. It must be admitted that the act is loosely drawn, but the rule that it is the duty of courts to so construe statutes as to uphold their constitutionality and validity, if it can be reasonably done, is so well established that the citation of authorities is needless. In other words, if the proper construction of a statute is doubtful, courts must resolve the doubt in favor of the validity of the law. Statutes and city ordinances providing for fire-escapes are usually somewhat general in their enactments, and necessarily so, for the reason that it is impossible for the legislature to describe in detail how many fire-escapes shall be provided, how they shall be constructed, and where they shall be located in order to serve the purpose of protecting the lives of occupants, in view of the varied location, construction, and surroundings of buildings; and hence, so far as we have been able to ascertain, acts similar to the first section of this statute have been sustained in other states, though perhaps the question here raised has never been directly presented: *Rose v. King*, 49 Ohio St. 213, 30 N. E. 267; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Pauley v. Steam Gauge etc. Co.*, 131 N. Y. 90, 29 N. E. 999; *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201; *Orin v. Steinkamp*, 54 Ohio St. 284, 43 N. E. 490; *Sewell v. Moore*, 166 Pa. St. 570, 31 Atl. 370; *Keely v. O'Conner*, 106 Pa. St. 321, 322; 2 Pa. Dist. Rep. 623.

The general rule is, that a statute must be complete when it leaves the legislature—as to what the law is—⁶¹¹ leaving its execution to be vested in third parties. Thus, it was said in *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738: “The result of all the cases on this subject is, that a law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors, or other appointee or delegate of the legislature, so that in form and substance it is a law in all its details in *præsenti*, but which may be left to take effect in *futuro*, if necessary, upon the ascertainment of any prescribed fact or event.” And it is said in *Sutherland on Statutory Construction*, section 68: “The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to

its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made."

In *People v. Reynolds*, 5 Gilm. 1, it was held that to establish the principle that whatever the legislature may do it shall do in every detail or else it shall go undone, would be almost to destroy the government. It is there said (page 13): "Necessarily, regarding many things especially affecting local or individual interests, the legislature may act either mediately or immediately. We see, then, that while the legislature may not divest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly, or advantageously, do itself. Without this power legislation would become oppressive and yet imbecile."

In this act the law is complete in all its details, requiring the fire-escapes to be put in certain buildings. The outside escapes must be so constructed as to render access to the same from each story easy and safe. Though just what is meant by "automatic, metallic fire-escapes" may be uncertain, it does require a proper device to be attached to the inside of the described buildings so as to ⁶¹² afford an effective means of escape to all occupants who, for any reason, are unable to use the ladders or stairs. In the execution of the law the inspector of factories is given a discretion as to the number, location, material, and construction of such escapes in each and every building. We are unable to see in what way the act, thus understood and construed, delegates to the inspector of factories legislative power.

Of still less force is the objection that the act confers judicial power upon the inspector of factories. The inspector is given no power to judicially determine any question, but acts ministerially in the supervision of the building of fire-escapes. Judicial power is "the power which adjudicates upon, and protects the rights and interests of, individual citizens, and to that end construes and applies the law." The judicial power is never extended to cases of the exercise of judgment in the execution of a ministerial power: *Owners of Lands v. People*, 113 Ill. 296.

It is also objected that the subjects mentioned in the body of the act are not sufficiently expressed in the title. The title of the act is, "An act relating to fire-escapes for buildings." It seems to be thought that this title is not sufficient to cover the provisions imposing duties upon inspectors of factories, the

grand jury, the sheriff, and the circuit and criminal courts, and the penalty prescribed for a violation of the act. Section 13 of article 4 of the constitution, requiring acts of the legislature to embrace in their title but one subject, which shall be expressed in the title, is complied with where the general object of an act is so expressed. "It is not to be expected, neither is it possible, for the title of the act to contain all the various provisions of the act itself. . . . If such was the case, the title to the act would have to be as comprehensive as the act itself. Such was not the object or intent of the constitution": *Burke v. Monroe County*, 77 Ill. 610. Judge Cooley, in his work on Constitutional Limitations, page 172, dealing with this subject, ⁶¹³ says: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable, but would actually render legislation impossible." It has accordingly been held that the title of "An act to establish a police government for the city of Detroit" was not objectionable for generality, and that all matters properly connected with the establishment and efficiency of such a government, including taxation for its support and courts for the examination and trial of offenders, may consistently be included in the bill under this general title. Our holdings have been consistent with the rule thus announced.

A further objection that the statute is local or special is, we think, without force. "Laws are general and uniform, not because they operate upon every person in the state—for they do not—but because every person who is brought within the relations and circumstances provided for is affected by the laws. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation": *People v. Wright*, 70 Ill. 388. It is sufficient under that provision of the constitution which prohibits local or special legislation if a law applies to all subjects of the same class or degree: *Potwin v. Johnson*, 108 Ill. 70. This act applies to all buildings "four or more stories in height, excepting such as are used for private residences exclusively," with a proviso "that all buildings more than two stories in height, used for manufacturing purposes," etc., shall have fire-escapes.

The act cannot be held to be local, nor is it special in its enactment; nor can we see in what sense it does not operate uniformly.

§14 It is said that "even though it is assumed that the law is capable of enforcement, no one can be held liable for the non-performance therewith until the inspector of factories has served the notice required by the act." With this contention we cannot agree. It is true the first and second sections do not say who shall provide the required fire-escape, but we think the fair and reasonable intendment is that the owner or owners shall perform that duty, and we so held in construing the fire-escape act of 1885, the provisions of which in this regard are the same as the act under consideration, in the recent case of *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501. The language of section 6, "who shall be required to place one or more fire-escapes upon any building or buildings, under the provisions of this act," does not mean who shall be required by the inspector of factories, but who shall be required by the act. The duty to provide fire-escapes upon buildings described in section 1 does not depend upon the performance of any duty by the inspector of factories.

In *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153, the language of the act under which the suit was brought was, "in any store or building in the city of New York in which there shall exist or be placed any hoisting elevator or well-hole, the openings thereof through and upon each floor of such buildings shall be provided with, and protected by, a substantial railing, and such good and sufficient trap-doors with which to inclose the same, as may be directed and approved by the superintendent of buildings," and it was held "the exercise of the duty imposed upon the defendants by this statute was not dependent upon any action of the superintendent of buildings. They could not properly delay for him to direct, but it was for them to call on him for directions and approval in that respect."

In *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536, where the act provided "that every building in the city of Brooklyn should have a scuttle or place of egress in the roof thereof," etc., and also that certain houses "shall be provided with such §15 fire-escapes and doors as shall be directed and approved by the commissioner" (of the department of fire and buildings), and also that "any person, after being notified by such commissioner, who shall neglect to place upon any such building the fire-es-

cases herein provided for, shall forfeit the sum of five hundred dollars, and shall be guilty of a misdemeanor," it was held: "The owner of the building in question was bound to provide it with a fire-escape. He was not permitted to wait until he should be directed to provide one by the commissioners. He was bound to do it in such way as they should direct and approve, and it was for him to procure their direction and approval." And the court further says: "Here was, then, an absolute duty imposed upon a defendant by statute to provide a fire-escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in case of a fire. For the breach of this duty, causing damage, it cannot be doubted that the tenants have a remedy." To the same effect is *Rose v. King*, 49 Ohio St. 213, 30 N. E. 267.

When the act went into effect it was the duty of every owner, trustee, or lessee or occupant, in the actual control of any building within the description mentioned in the first section, in obedience to section 6, to file in the office of the inspector of factories a written application for a permit to erect or construct fire-escapes, and if these defendants failed to do so, as alleged in the several counts of the declaration, and injury resulted from their failure to place the required fire-escapes in the building described, they incurred a liability to the person injured, and cannot escape that liability merely because they may not have been designated by the inspector of factories as the persons upon whom the duty was imposed to comply with the law. In other words, the law imposed upon them the performance of the duty, and the action of the inspector of factories, the grand jury, the sheriff, and the circuit and criminal courts is only made necessary in case they failed to do that duty. It has ⁶¹⁶ been held that the term "owner," in similar statutes, does not mean the owner of the fee, but may mean the lessee in actual possession and control of the building; but we are not aware that any court has held such laws invalid because of their failure to definitely designate who should be liable. We think it clear that under this statute the owner is primarily liable for a failure to perform the duty.

Several of the counts in the declaration aver that the defendants, upon and for a long time prior to March 16, 1898, were owners of a certain seven-story brick building, etc.; that said building was used for manufacturing purposes; that by reason of the statute approved May 27, 1897, in force July 1, 1897, it be-

came their duty to provide such building with such fire-escapes, the number, location, material, and construction of such escapes to be subject to the approval of the inspector of factories, but that the defendants have never filed in the office of said inspector of factories a written application for a permit to erect or construct such fire-escapes; that by reason of the statute it became their duty to apply for such permit, and that they failed and neglected to comply with the requirements of the statute in providing fire-escapes. The demurrer, of course, admits these allegations to be true, and we are of the opinion that such counts, under the provisions of the statute, sufficiently fix the liability upon defendants.

A considerable portion of the argument is devoted to the discussion of the question whether or not the statute should receive a strict construction. We think it is well settled that at common law there was no liability imposed upon the owner of a building to provide the same with fire-escapes or other means of exit in case of fire, as a general rule, and that for this reason, as well as because of the penal character of the act, it must be strictly construed—that is, that it cannot be extended to persons or to requirements not fairly within the provisions of the act. The rule in such case is, that courts cannot properly ⁶¹⁷ give force to statutes beyond what is expressed by its words or is necessarily implied from what is expressed. Our construction of this act in no way violates that rule.

The judgment of the superior court will be reversed, and the cause will be remanded to that court for further proceedings not inconsistent with the views here expressed.

Every Statute is Presumed Constitutional: Alabama etc. *R. R. Co. v. Reed*, 124 Ala. 253, 82 Am. St. Rep. 166, 27 South. 19; *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703, 48 S. W. 305. Legislative acts are to be upheld in all cases of doubt: *Overshiner v. State*, 156 Ind. 187, 83 Am. St. Rep. 187, 59 N. E. 468. They should not be declared unconstitutional unless the violation of the constitution is so manifest as to leave no room for reasonable doubt: *State v. Layton*, 160 Mo. 474, 83 Am. St. Rep. 487, 61 S. W. 171; *Hanna v. Young*, 84 Md. 179, 57 Am. St. Rep. 396, 35 Atl. 674.

The Title of a Statute is sufficient within the requirements of the constitution when it discloses the general object of the legislation: See the monographic note to *Crookston v. County Commissioners*, 79 Am. St. Rep. 460.

Special and Class Legislation is considered in the monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789. The fourteenth amendment contemplates classes of persons, and protection is deemed equal if all persons in the same class are treated alike under like circumstances and conditions: *State v. Broadbelt*, 89 Md.

565, 73 Am. St. Rep. 201, 43 Atl. 771. The legislature has power to form classes for the purpose of police regulation: *Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103, 55 N. E. 663. But the legislation must extend to, and embrace equally, all persons who are or may be in like situation or circumstances, and the classification must be natural and reasonable, not arbitrary and capricious: *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959.

Fire-escapes.—The constitutionality of statutes requiring the owners of tenement houses and factories to provide fire-escapes seems to have passed unquestioned in *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
MAINE.

HENRY v. DENNIS.

[95 Me. 24, 49 Atl. 58.]

ONE MAKING A MISREPRESENTATION IS RESPONSIBLE to such persons only as it is intended for. (p. 866.)

MISREPRESENTATION TO THIRD PERSON.—A misrepresentation to one with the intention that it shall reach and be acted upon by another, and which does reach and is acted upon by him, gives him the same right to relief or redress as if made to him directly. (p. 866.)

MISREPRESENTATION.—ONE IS LIABLE TO A PARTNERSHIP for misrepresentation to one of its members, though not made to him as such, if he, relying thereon, induces his firm to act to its injury. (p. 867.)

Two actions for false representations, one brought by W. S. Henry, Jr., and the other by him and his copartner.

L. C. Cornish, for the plaintiff.

A. M. Spear, for the defendant.

27 **WISWELL, C. J.** For some time prior to May 1, 1896, Henry, the plaintiff in one of these suits, had been engaged in the wool business alone, under the name of W. S. Henry, Jr., & Co. On that day he formed a copartnership in the same business with one Charles C. Parsons, and the business was subsequently carried on in the firm name of Henry & Parsons. But after the formation of the firm, Mr. Henry continued his individual business, in the name of W. S. Henry, Jr., & Co., to the extent of selling, from time to time, a quantity of wool which he had on hand at the time of the formation of the copartnership.

On August 15, 1896, after the formation of the firm of Henry & Parsons, but while Mr. Henry was still selling on his own account the wool which he previously had on hand, and which had not been ²⁸ turned over to the firm, Henry wrote a letter to the Gardiner Woolen Company, in which he referred to an order for wool just received and in which he says: "At Mr. W. D. Eaton's request we sent you the little lot without any knowledge of your financial standing, but if we are to continue to ship you wool on sixty days' time, we feel justified in informing ourselves in that respect, and we presume that you would prefer to have us inquire directly of you than of outside parties. . . . Will you kindly favor us with full particulars, which we trust will warrant a continuation of our business relations to our mutual benefits." This letter was dictated by Mr. Henry, as shown by the letter, but was signed in the name of W. S. Henry, Jr., & Co.

In reply to this letter of inquiry, the defendant, to whom the letter was turned over for reply, under date of August 24, 1896, wrote a letter directed to W. S. Henry & Co., which, it is claimed, contained false and material representations as to the financial standing and condition of the Gardiner Woolen Company, which were subsequently acted upon by Mr. Henry, both individually and as a member of the firm of Henry & Parsons, by making sales to the woolen company on credit, upon his own account and upon that of the firm. The plaintiffs, Henry in one case and Henry & Parsons in the other, being unable to collect of the woolen company the amounts due them, because of its insolvency, brought these two actions to recover for the injuries sustained by them by reason of the alleged misrepresentations of the defendant.

The two cases were tried together and the jury found against the defendant in both cases. The only question now presented by the exceptions is, whether or not the representations contained in the defendant's letter directed to W. S. Henry & Co. could have been so acted upon and relied upon by Mr. Henry as a member of the firm of Henry & Parsons that the defendant would be liable to that firm for any injury sustained by it on account thereof, as well as to Henry individually, for any injury sustained by him for the same reason.

It is urged in behalf of the defendant that he should not be, and is not, liable to the firm of Henry & Parsons for any misrepresentations ²⁹ contained in that letter, because the letter was not directed to the firm, and because there was no

privity between it and the defendant. The case shows that the defendant did not know of the existence of Mr. Parsons, or of the firm of Henry & Parsons. But Henry was the active member of the firm, and the one who made these sales upon credit to the woolen company, and the jury must have found that Henry was induced to make these sales upon credit, both for himself and for the firm, by the representations contained in the defendant's letter, and that in making the sales and in extending credit to the company, both individually and as a member of the firm, he relied upon these representations.

No authority exactly in point has been called to our attention, but the general principles relative to the liability of a person for injuries caused by such misrepresentations are well settled. One who makes a misrepresentation must, to render himself liable, have made it with the intention that it should be acted upon by the person to whom it is made or by one to whom he intended it should be communicated, and he is therefore responsible to such persons only as it was intended for.

It is a general rule that a person cannot complain of false representations, for the purpose of maintaining an action of deceit, unless the representations were either made directly to him, with the intention that they should be acted upon by him, or made to another person with the intention that they should be communicated to him and acted upon by him. A representation made to one person with the intention that it shall reach the ears of another and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly: 14 Am. & Eng. Ency. of Law, 2d ed., 148, 149, and cases there cited. See, also, *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267; *Nash v. Minnesota etc. Trust Co.*, 159 Mass. 437, 34 N. E. 625.

Applying these general principles to the particular question here involved, we think that the defendant is liable to the firm for such injury as it suffered in consequence of the misrepresentations contained ⁸⁰ in his letter, whereby the firm was induced to make sales of its goods to the woolen company upon credit. The answer of the defendant to the letter of inquiry was directed to a firm; its object was to obtain credit for the woolen company from a firm of which Henry was a member. True, the defendant did not know that Parsons was associated in business with Henry, nor did he know, so far as the case shows, that Henry was also doing business alone under a firm name.

But he must have contemplated that the contents of this letter would either be communicated to other members of any firm of which Henry was a partner, in that business, and be acted upon by the firm, or that Henry, acting for a firm, would be induced by his letter to give credit to the woolen company. The letter was not only intended for Henry, but as well for those associated with him in that business.

It is of no consequence that the letter was directed to W. S. Henry & Co., when it was in fact relied upon by Henry as a member of the firm of Henry & Parsons. It is not necessary, in order for a defendant to be liable for the consequences of his misrepresentations, that he should know the names of the persons to whom the misrepresentations may be communicated, provided he contemplated that they should be communicated to others and be acted upon by them.

Here, as the case shows, Henry, to whom the misrepresentation was directly made, was induced thereby, as a member of the firm of Henry & Parsons, to sell the firm's goods on credit, and thereby the firm suffered. This is precisely what was within the intention of the defendant; he is consequently liable therefor. This result is in accordance with the ruling of the court at the trial.

Exceptions overruled.

OF THE LIABILITY FOR MISREPRESENTATIONS INDIRECTLY MADE TO THE COMPLAINING PARTY.

I. General Principles.

II. Persons in Particular Relations.

- a. Joint Parties or Owners.
- b. Principal and Agent.
- c. Partner and Copartner.
- d. Insured and Beneficiary.
- e. Vendor and Vendee.
 1. In General.
 2. Property for the Use of Others.
- f. Mortgagor and Mortgagee.

III. Representations of Financial Responsibility.

- a. In General.
- b. Statements to and by Commercial Agencies.

IV. Representations by Promoters of Corporations.

- a. Oral Statements and Speeches.
- b. Prospectuses.
- c. Statement in Stock Exchange.

V. Representations of the Condition of Corporations.**a. Banks and Corporations, Generally.****b. Insurance Companies.****I. General Principles.**

It is by no means essential that false representations, in order to vitiate a transaction or to form the basis of a remedy or a defense, should be made directly to the complaining party by the party sought to be charged. It is immaterial whether a misrepresentation is made directly or indirectly to the party injured, whether it passes through a direct or a circuitous channel, provided it is made with the intent that it shall reach him and be acted upon, and it does reach him and is acted upon to his injury: *Carvill v. Jacks*, 43 Ark. 454; *James v. Crosthwait*, 97 Ga. 673, 25 S. E. 754; *Commonwealth v. Call*, 21 Pick. 515, 523; *Chubbuck v. Cleveland*, 37 Minn. 466, 5 Am. St. Rep. 864, 35 N. W. 362; *Watson v. Crandall*, 7 Mo. App. 233, affirmed in 78 Mo. 583; *Carzeaux v. Mall*, 25 Barb. 578; *Chester v. Dickerson*, 52 Barb. 349; *Eaton etc. Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Barry v. Croskey*, 2 Johns. & H. 1, 23.

This rule is broadly stated in *Swift v. Winterbotham*, L. R. 8 Q. B. Cas. 244, 253, in this language: "It is now well established that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby." There must always be evidence that the person charged with the false statement and the fraudulent conduct had in his contemplation the individual making the complaint, or, at all events, that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring, or might injure, by what he was doing: *Bedford v. Bagshaw*, 29 L. J. Ex. 65.

"The rule of liability in such cases," says Patterson, J., in *Kelley v. Gould*, 64 Hun, 639, 19 N. Y. Supp. 349, affirmed in 141 N. Y. 596, 36 N. E. 320, "differs necessarily in one respect, but only in one, from that which obtains in an action brought by the person to whom the representations are directly made. The elements necessary to the maintenance of an action such as the present are, that the representations, if proven to have been made, must be false; that they must have been known by the defendant to be false, or it must be shown that he had reason to know that they were false, or that he assumed and intended to convey the impression that he had knowledge of the facts when he really was without such knowledge; and that the false representations must

have been made with the intent that they should be communicated to, and acted upon, by third parties; and that they were the inducing cause of the act, resulting in loss to such third parties."

One of the first essentials of indirect fraud, as stated above, is that the representations should be made with fraudulent intent: *Miller v. Howell*, 2 Scam. 499, 32 Am. Dec. 36; *Fooks v. Waples*, 1 Harr. 181, 25 Am. Dec. 64. This question of fraudulent intent, or intent to deceive, in its relation to statements respecting solvency and pecuniary responsibility, is considered under "Representations of Financial Responsibility," *infra*.

It must also appear that the party making the representation intended it to be acted upon by the party complaining, and that it was so acted upon: *Smither v. Calvert*, 44 Ind. 244; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436; *Butterfield v. Barber*, 20 R. I. 99, 87 Atl. 532; *Ware v. Brown*, 2 Bond, 267; Fed. Cas. No. 17,170; *Bank of Montreal v. Thayer*, 7 Fed. 622. See, also, *Bliss v. Sickles*, 21 N. Y. Supp. 273, 66 Hun, 633. If a statement is made to one person to induce him to do a particular act, the rest of the world have no right to rely on it; and if they do so and suffer thereby, they cannot recover against the one who made it: *McCracken v. West*, 17 Ohio, 16. It is not necessary, however, that the object be to deceive the plaintiff in particular. It is enough that the object is to defraud any who may act: *Williams v. Wood*, 14 Wend. 126; *Bank of Montreal v. Thayer*, 7 Fed. 622. Where there is a design to defraud the public, anyone who suffers injury thereby may maintain his action: *Bartholomew v. Bentley*, 15 Ohio, 659, 45 Am. Dec. 596.

Misrepresentations made by a third person, without the knowledge, authorization, or procurement of a party, cannot render him liable therefor, nor vitiate the contract or transaction involved: *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Prescott v. Cooper*, 37 La. Ann. 553; *Nash v. Minnesota Title etc. Co.*, 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039; *Garrett v. McComb*, 68 N. Y. Supp. 996, 58 App. Div. 419; *Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 42 S. W. 149. If one party to a transaction refers the other to a third person for information, who makes false and fraudulent representations, the party making the reference is liable for such representations: *Linton v. Housh*, 4 Kan. 535; *Graham v. Moffett*, 119 Mich. 803, 75 Am. St. Rep. 393, 78 N. W. 132; *Ashner v. Abenheim*, 43 N. Y. Supp. 69, 19 Misc. Rep. 282; *Cabaness v. Holland*, 19 Tex. Civ. App. 383, 47 S. W. 379. And where, in pursuance of an agreement to that effect with a corporation, purchasers of merchandise refer the seller to the corporation for information, and its officers make false representations to the purchasers, the corporation will be estopped to assert that making the representations was *ultra vires*: *American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090.

One is liable to a third person for misrepresentations which he makes to another, who, to the knowledge of the maker, communicates them to such third person: *Pilmore v. Hood*, 5 Bing. N. C. 97. And where one procures a third party to make false representations, he is liable therefor: *Maggart v. Freeman*, 27 Ind. 531; or where he supplies another with means of perpetrating a fraud, in his own name, against one person, and the fraud is perpetrated by the same means against another: *Wilson v. Green*, 25 Vt. 450, 60 Am. Dec. 279. One who makes willfully false statements to be fraudulently used by another, as an inducement to a third person to enter into a contract with the party repeating them, is as much guilty of a deceit as the latter, and is equally liable to the party deceived: *Cheney v. Powell*, 88 Ga. 629, 15 S. E. 750.

Where a bank innocently pays money to the holder of an instrument, relying on the false representation of a third person that he knows the holder to be the payee, it may recover from such person the amount which it is afterward compelled to pay the true payee: *Lahay v. City Nat. Bank*, 15 Colo. 339, 22 Am. St. Rep. 407, 25 Pac. 704.

And where officers of a corporation issue negotiable bonds bearing the false statement that they are first mortgage bonds, such statement must be considered as intended to be acted upon as true by all who would purchase the bonds, whether directly or indirectly; and any person who purchases them in good faith, relying thereon, and is injured, may hold the persons liable for actual damages received: *Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325.

II. Persons in Particular Relations.

a. **Joint Parties or Owners.**—The representations of one of a class of persons interested in a transaction are binding on all, although some may not have been directly implicated. Thus, if one is induced to buy corporate stock by the fraudulent representations of certain directors and stockholders, some of which is owned by each of them, all of whom receive their portion of the proceeds, the representations of the individuals are binding on all, and each is liable therefor: *Reynolds v. Leyden*, 57 N. Y. Supp. 210, 39 App. Div. 650. And if several engage in business jointly, using a corporate name and issuing stock, and in the promotion of the scheme misrepresentations are made by those holding themselves out as promoters or managers as to matters within the knowledge of all their associates, all are liable to those who, in reliance upon such representations, purchase stock to their injury: *Hornblower v. Orandall*, 78 Mo. 581.

If one joint owner of property induces another to buy it by fraudulent representations, and his co-owners, knowing thereof, do not contradict them, and take their share of the proceeds of the sale, the purchaser may maintain an action for deceit against them

jointly: *O'Leary v. Tillinghast* (R. I.), 46 Atl. 751. See, also, *Bostwick v. Lewis*, 1 Day, 250, 2 Am. Dec. 73; *Johnson v. Wallower*, 15 Minn. 472. And if a vendor gives a false receipt, purporting to be in payment of half the price of land, to enable the vendee to sell the land for double its actual price, he is a joint wrongdoer with the vendee, and is liable for the fraud, although he is not benefited: *Stoney Creek Woolen Co. v. Smalley*, 111 Mich. 321, 69 N. W. 722.

b. **Principal and Agent.**—It is elementary that a principal is liable for the fraud of his agent perpetrated within the scope of his employment or authority: *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 51 Am. St. Rep. 727, 43 N. E. 68; *Griswold v. Gebbie*, 126 Pa. St. 353, 12 Am. St. Rep. 878, 17 Atl. 673; and that the agent himself is also liable: *Campbell v. Hillman*, 15 B. Mon. 508, 61 Am. Dec. 195; *Hedin v. Minneapolis etc. Institute*, 62 Minn. 146, 54 Am. St. Rep. 628, 64 N. W. 158. However, as cases falling within these principles do not involve the question of liability for representations indirectly made to the injured party, the representations of the agent being considered the representations of his principal, they will not here be further considered.

Moreover, it is no defense to an action for false representations that they were not made to the plaintiff in person, but to her agent. Such representations made to the agent and by him communicated to his principal, upon which he acted, are, in legal contemplation, representations to the principal himself. If they were designed to reach and influence him, it can make no difference whether they were communicated to him directly or through the intervention of an agent: *Commonwealth v. Call*, 21 Pick. 515, 523; *Culliford v. Gadd*, 17 N. Y. Supp. 457, affirmed in 139 N. Y. 618, 35 N. E. 205. But one who has been damaged by acting upon false and fraudulent representations made to him as agent of another, but not intended to be acted upon by himself, has no action for deceit against the party making the representations: *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436.

If an agent, by making misrepresentations to his principal, induces the latter to enter into transactions with other persons, the fraud of the agent invalidates such transactions or renders himself liable. Thus, where an agent induces his principal, by false statements of value, to transfer land to another for a sum much less than its value, the transaction is vitiated: *Webb v. Marks*, 10 Colo. App. 429, 51 Pac. 518. And a broker who fraudulently represents to his principal, whose money he is loaning, that certain security is good, on which the money is loaned, is liable therefor: *Rubens v. Mead* (Cal., 1898), 53 Pac. 432.

False representations of an agent, in order to bind the principal, must be made in reference to the subject matter of the agency. Hence the owner of land who employs an agent to sell it is not liable to one whom the agent, by misrepresentations as to a cor-

poration, induces to take stock therein, even though it was organized to purchase the land and the land is transferred to it, it appearing that the owner had nothing to do with the corporation, or the procurement of the subscription to the stock: *Hoyer v. Ludington*, 100 Wis. 441, 76 N. W. 348.

c. **Partner and Copartner.**—On the principle of agency, a partnership and its members are liable for the fraud of a partner committed while acting for the firm and transacting its business: See the monographic note to *Williams v. Hendricks*, 67 Am. St. Rep. 46-50. On the same principle, it would seem that a false representation made to a partner through which the firm incurs damage would give the same right of redress as though made directly to the firm or to all its members. Indeed, it is held in the principal case (*Henry v. Dennis*, 95 Me. 24, ante, p. 365, 49 Atl. 58, that one is liable to a partnership for misrepresentations to one of its members, though not made to him as such, if he, relying thereon, induces his firm to act to its injury.

d. **Insured and Beneficiary.**—In *Wagner v. National Life Ins. Co.*, 90 Fed. 395, the holder of a life insurance policy went to the office of an agent of the insurance company for the purpose of surrendering his policy for its surrender value and taking a new one. The company's physician there examined him, and rejected him as an applicant for new insurance because of an affection of the heart, at the same time stating that the disease was not dangerous, and would not cause his death, but would prevent his obtaining insurance in another company, and advising him to retain his old policy. However, the insured surrendered his policy, and he and his beneficiary, who was his wife, executed a release thereon. A short time afterward the insured died of the disease, as the physician knew he was likely to. It was held that the beneficiary could not avoid the release on the ground of the false statement of the physician, it not being the inducement, nor intended to be, of the release, though if the physician had stated the facts within his knowledge, the policy might not have been surrendered.

e. **Vendor and Vendee.**

1. **In General.**—A vendor may rescind a contract for the sale of land for false representations made by the vendee's agent: *Ellsworth v. Randall*, 78 Iowa, 141, 16 Am. St. Rep. 425, 42 N. W. 629. So may a vendee rescind the contract if induced to enter into it by the fraud of the vendor's agent: *Rackeman v. Riverbank*, 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; *White v. Lowden*, 28 N. Y. Supp. 619, 8 Misc. Rep. 106; *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178, 43 N. W. 800. But as an agent is his principal's alter ego, he cannot, in any true sense, be deemed a third person, and hence cases of this class are not within the scope of the present discussion.

A vendor is responsible for fraudulent representations inducing a sale, whether made by himself or by a third person whom he expects to give the vendee false information, when he allows the contract to be consummated with knowledge that the vendee is acting on such false information: *Graham v. Moffett*, 119 Mich. 308, 75 Am. St. Rep. 393, 78 N. W. 132; *Law v. Grant*, 37 Wis. 548.

To entitle a purchaser to relief from false representations, it is not necessary that they should be made to him by the seller directly. If such representations are made to a third person with the intent that they shall reach the purchaser and be acted upon by him in the manner occasioning injury, or, more broadly, if they are made with the intent of their influencing everyone to whom they may be communicated, or who may read or hear about them, one of the latter class of persons will be in the same position as one to whom the representations are communicated directly: *Maggart v. Freeman*, 27 Ind. 531; *Mead v. Mali*, 15 How. Pr. 347; *Gainsville Nat. Bank v. Bamberger*, 77 Tex. 48, 19 Am. St. Rep. 738, 13 S. W. 959. See, also, *Birkendall v. Hartsock*, 58 Mo. App. 234; *Sigafus v. Porter*, 84 Fed. 430. And a third person making fraudulent representations as to the subject matter of a sale is liable to the purchaser: *McGibbons v. Wilder*, 78 Iowa, 531, 43 N. W. 520; *Bean v. Herrick*, 12 Me. 262, 28 Am. Dec. 176; *Medbury v. Watson*, 6 Met. 246, 39 Am. Dec. 726; *Nash v. Minnesota Title etc. Co.*, 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039; *Irwin v. Sherril*, *Taylor* (N. C.), 1, 1 Am. Dec. 574.

But there must be participation in, or knowledge of, the vendor. A sale or conveyance procured through the fraud of a third party, without the knowledge or authority of the seller, is binding on the buyer: *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Nash v. Minnesota Title etc. Co.*, 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039; *Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 42 S. W. 149. The misrepresentations of third parties of whom the vendee seeks an opinion as to the quantity or quality of the land are not available to obtain a rescission, when they do not act in the interest or at the request of the vendor: *Lindsey v. Veasey*, 62 Ala. 421.

When one purchases land of another, which neither has seen, the purchaser taking the representations of a third person, the maxim of caveat emptor applies: *Gimblin v. Harrison*, *Sneed* (Ky.), 315, 2 Am. Dec. 720. And when neither has any personal knowledge of the land, but the vendor exhibits to the vendee letters from another which misrepresent its location or value, the vendor acting in good faith, the vendee is bound: *Cooper v. Lovering*, 106 Mass. 77; *Crist v. Dice*, 18 Ohio St. 536.

The fact that the owner of an abstract of title allows another to use it as an accommodation cannot have the effect of binding the owner to answer for the representations of title contained therein: *Flynn v. Wilkinson*, 56 Ill. App. 239.

The measure of damages for fraudulent representations inducing a sale on credit to an insolvent third party is the value of the property at the time of the sale, less the amount paid and the value of security taken: *American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090.

2. **Property for the Use of Others.**—A vendor guilty of fraud or deceit is liable to anybody who is injured thereby, although not one of the parties to the original contract, provided his use of the article is contemplated by the vendor: *George v. Skivington*, 6 L. R. Ex. 1; *Landgridge v. Levy*, 2 Mees. & W. 519. In the last case the plaintiff's father purchased a gun of the defendant to be used by himself and his sons, which the seller represented to be of a certain make, and to be safe, knowing it to be of another make, and composed of inferior material. While the plaintiff was using the gun, it exploded, to his injury. The court said: "We decide that the defendant is responsible in this case for the consequences of his fraud while the instrument was in the possession of a person to whom his representations were either directly or indirectly communicated, and for whose use he knew it was purchased."

So, where the son of the plaintiff purchased a horse of the defendant for the use of the plaintiff, and the defendant represented that the animal was suitable for the plaintiff to ride, whereas the horse was vicious and accustomed to run away, which was known to the defendant, and the plaintiff was injured by the horse running away and throwing her, the defendant was held liable: *Allison v. Tyson*, 5 Humph. 449.

In cases of this kind it is important to distinguish between fraudulent representations and mere warranties. If there is no fraud, but only a warranty, clearly no action for deceit will lie: See *Longmeid v. Holliday*, 6 Ex. 761; *Langridge v. Levy*, 2 Mees. & W. 519.

2. **Mortgagor and Mortgagee.**—The fact that a third person induces a mortgagee to foreclose, and seeks to profit thereby by buying the property, does not constitute a fraud on the mortgagor, making the third person liable to him: *Johnson v. Reed*, 125 Cal. 74, 57 Pac. 680. Nor does the fact that a mortgagee does not disclose the existence of the mortgage, though present when the property is conveyed, make him liable in an action for deceit, if he is not questioned as to the existence of encumbrances: *Littlejohn v. Drennon*, 95 Ga. 743, 22 S. E. 657.

III. Representations of Financial Responsibility.

a. **In General.**—The great majority of cases involving indirect fraud are based upon false representations concerning solvency or financial standing. Third persons are frequently inquired of by one party to a transaction as to the pecuniary responsibility of the other party, or one party may refer the other to a third person for

information, or a person or concern may make statements, issue reports, circulars, and the like, in order to inspire the confidence of any who may be interested in a business way. The question of fixing the liability of fraudulent representations growing out of any of these cases often becomes of exceeding importance.

When inquiries are made of an individual in respect to the solvency of another, of course, he is not obliged to make any representations; but if he undertakes to do so, he is bound by every consideration of fairness and honesty, as well as by law, to speak truthfully: *Viele v. Goss*, 49 Barb. 96. If he knows the party to be insolvent, yet represents him to be a man of good credit, an action will lie against him by one sustaining loss thereby: *Upton v. Vail*, 6 Johns. 181, 5 Am. Dec. 210; *Bean v. Wells*, 28 Barb. 466.

A false and fraudulent representation or affirmation, relative to the credit and pecuniary ability of a person, to a merchant or trader, who is thereby induced to trust such person with goods, is a sufficient ground of action, although there may have been no dishonest purpose of appropriating the goods to the use of the party giving the recommendation, or in any way deriving benefit from the fraud: *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141; *Palsey v. Freeman*, 3 Term. Rep. 51. See, also, *Anderson v. McPike*, 86 Mo. 293; *Cutter v. Adams*, 15 Vt. 237. The sale, so long as the property remains in the hands of the vendee, may be rescinded: *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46. And an action may be maintained for false representations as to the credit of a vendee which induce the vendor not to rescind a sale: *Bowen v. Carter*, 124 Mass. 426.

It is no defense, in an action for damages for inducing one to part with an article to an insolvent, that such article is a violation of a patented one: *Rheem v. Naugatuck Wheel Co.*, 33 Pa. St. 358.

If one induces another to loan money to an insolvent by representing him to be otherwise, he is liable therefor: *Goodale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11; *Briggs v. Brushaber*, 43 Mich. 830, 38 Am. Rep. 187, 5 N. W. 383.

And where a bank-book is issued and delivered, containing a false entry of credit in favor of the holder, and a third person inquires of the banker as to the genuineness of the credit, and he, while expressly refusing to give, in terms, the information sought, induces the belief that the entry is true and correct, whereby the inquirer suffers loss, the banker may be liable: *James v. Crosthwait*, 97 Ga. 673, 25 S. E. 754.

In order to entitle one to redress where he has relied on false representations as to another's financial standing, it is not necessary that the person making the statements should be benefited thereby: *Young v. Hall*, 4 Ga. 95; note to *Lord v. Colley*, 25 Am. Dec. 448; *Palsey v. Freeman*, 3 Term Rep. 51; though it must be shown that the plaintiff suffered loss, fraud without damage furnishing

no cause of action: *Taylor v. Gouest*, 58 N. Y. 262; *McNaughton v. Conklings*, 9 Wis. 316.

And it is not necessary to show that the object of the false representation is to defraud the plaintiff in particular. If it is to give a false credit, the action is well brought by any who happen to be injured by it: *Young v. Hall*, 4 Ga. 95; *Clopton v. Cozart*, 21 Miss. 363. If a person intending to defraud someone gives a general recommendation of credit to an insolvent, anybody sustaining loss by reason of such recommendation is entitled to an action for such loss grounded upon the fraud: *Allen v. Addington*, 7 Wend. 10.

On the other hand, if a false statement is made to one person to induce him to extend credit to another, the rest of the world has no right to rely on it. If they do so and suffer thereby, they cannot recover from the one who made it: *McCracken v. West*, 17 Ohio, 16. As is said in *Harrison v. Savage*, 19 Ga. 310, 312. "We cannot recognize the right of a party to act upon reported recommendations to others of a particular person as being worthy of credit, when no application was made by the person recommending, in his behalf, and then to look for a solvent man who may have spoken a word of kindness of an unfortunate friend, with no intention to deceive or defraud anyone, and compel him to pay a debt which the merchant's incautious desire to sell may have induced him to make." A recommendation of credit addressed simply to a surname preceded by "Mr.," stating that the person recommended is solvent, will justify anyone of that surname in acting upon the recommendation, if delivered to him with the apparent authority of the writer, and if acted upon to his injury, will support an action for deceit: *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923.

Misrepresentations to another as to one's own solvency gives no right of action to a third person against the maker by reason of the party to whom they are made communicating them to such third person, there being no authority on the part of such party to make the communication and they being considered confidential: *Rawlins v. Bean*, 80 Mo. 614; *Hosegood v. Bull*, 36 L. T., N. S., 617. See, also, *Iasigi v. Brown*, 17 How. 183. A creditor cannot make a statement of his debtor the basis of an action, when such statement was not intended to be relied or acted on by him: *Staver v. Coe*, 49 Ill. App. 426; *Bliss v. Sickles*, 21 N. Y. Supp. 273, 66 Hun, 633.

To constitute representations regarding the pecuniary responsibility of another actionable, there must be an intent to deceive: *Sylvester v. Henrich*, 93 Iowa, 493, 61 N. W. 942; *Clement v. Swanson*, 110 Iowa, 106, 81 N. W. 233; *Redpath v. Lawrence*, 42 Mo. App. 101. "Before the plaintiff could lawfully recover that loss from the defendant," said Daniel, J., in *Marsh v. Falker*, 40 N. Y. 562, "It was equally as essential to the right to do so that he should satisfactorily prove that these representations were fraudulently made; that

they were only false in fact, and caused the loss sustained by him, but beyond this, that they were made with the intent to deceive him. This was the gist of the action, and has always constituted its distinguishing element."

It is believed that this language, so far as it conveys the impression that there must be an actual intent to deceive, is misleading. Conceding that an intent to deceive is an essential ingredient of fraud, still it need not be an actual intent. An intention to deceive may be inferred from a positive statement in respect to the solvency of another, if the statement is known at the time to be false: *Tryon v. Whitmarsh*, 1 Met. 339, 35 Am. Dec. 339; *Boyd v. Browne*, 6 Pa. St. 310. See, too, *Mendenhall v. Stewart*, 18 Ind. App. 262, 47 N. E. 943; or if it is made recklessly or carelessly without investigation, when the untruth of the facts represented would have been made apparent on investigation: *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338.

In this connection, Mr. Justice Stone, in *Einstein v. Marshall*, 58 Ala. 153, 29 Am. Rep. 729, very aptly says: "An unbending rule cannot be laid down for all cases where, upon the representations of an uninterested person, one trusts another and suffers loss. Much must depend on the circumstances of the particular case. But when, as in this case, the person recommending knows that the object of the party procuring the recommendation is to obtain credit at a distance—knows that the proposed seller is unacquainted with the financial condition and credit of the proposed buyer—the law, in harmony with good morals and good neighborhood, requires that the same shall be faithfully and truthfully given. A representation as fact, of that which the party knows to be false, or of that of the truth of which he has no knowledge, or well-founded belief, falls below the standard of legal requirement. And if it turns out in fact that the representation is false, and the seller is deceived and suffers loss in consequence of the sale he made on the strength of it, the party recommending must make good the loss. It is no excuse for him that he did not collude with the purchaser, or that he did not know that the representation he made was true or false. Good faith requires that what he represents as fact shall be true, or that, from a proper knowledge of the surroundings, he is justified in having an intelligent belief that what he asserts is true. Mere spirit of accommodation, or desire to serve a friend, we fear, causes many recommendations which entail heavy loss on him who trusts, and is misled by them. It is time it should be known that he who thus knowingly, fraudulently, or even recklessly, enables one to cheat another, thereby shoulders the burden himself."

But it is important to observe in this connection that mere ignorance or stupidity on the part of a person making representations does not amount to fraud. One who merely answers the inquiries of a stranger, or courteously volunteers information in a matter

which does not concern him, must not intentionally mislead, but if he answers honestly to the best of his ability, he does his whole duty. If he is an ignorant, stupid man, and on that account the inquirer is led astray, it is not his fault, but the fault or misfortune of the person who relies upon him: *Nash v. Minnesota Title etc. Co.*, 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039. This case did not involve a representation as to the financial standing of another, but a representation respecting title to real estate.

There may be cases in which the intent to deceive is not a controlling circumstance. Lord Hirschell, in *Derry v. Peek*, L. R. 14 App. Cas. 337, says: "There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes v. Lock*, 10 Ves. 470a, may be cited as an example where a trustee has been asked by an intended lender upon the security of a trust fund whether notice of any prior encumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defense to the action."

The soundness of this doctrine was recognized, though the defendant was not held liable, in *Farrel v. National etc. Bank*, 43 Fed. 123, 149 U. S. 773, 13 Sup. Ct. Rep. 1046. In this case the plaintiff was about to make loans and advances to a corporation, and to verify the corporation's statement as to its financial condition, inquired of the defendant bank how much the corporation owed it. The president of the bank, in reply, misrepresented very material facts, the knowledge of which especially belonged to the bank, though he seemed to have acted in good faith. The misrepresentation was an erroneous conclusion of law, based upon puzzling facts. Shipman, J., said: "A misrepresentation was made, resulting from imperfectly understood and blurred facts, and a consequent erroneous conclusion of law, and it is, in my view, unjust to hold that the person who honestly comes to such an erroneous conclusion must be visited with the unfortunate pecuniary consequences of his error."

There is no liability for the representations, generally speaking, when made bona fide. If a party honestly states his own opinion believing at the time that he states the truth, he is not liable, though the representation turns out entirely untrue. It cannot be presumed fraudulent merely because it happens not to be true: *Lord v. Colley*, 6 N. H. 99, 25 Am. Dec. 445; *Russell v. Clark*, 7 Cranch, 69, 93; *Lord v. Goddard*, 13 How. 198, 211; *Haycraft v. Creasy*, 2 East, 92.

When a party giving credit has been free to ascertain the truth and negligent in doing so, he has no right of action against a third person for false representations as to the debtor's solvency: *Newsom v. Jackson*, 26 Ga. 241, 71 Am. Dec. 206.

Though a false representation concerning the financial standing of another is not the only inducement whereby credit is given him, still the maker may be liable. It is enough to entitle the plaintiff to recover if the representation complained of is a material inducement to the contract or transaction which occasions the injury, although there may have been other co-operating inducements: *James v. Crosthwait*, 97 Ga. 673, 25 S. E. 754; *Sioux Nat. Bank v. Norfolk State Bank*, 56 Fed. 139. Compare *Savage v. Jackson*, 19 Ga. 305. And even if the representations are required by statute to be in writing, reliance may be placed in part upon oral statements: *Tatton v. Wade*, 18 Com. B. 371; though, in such case, reliance must mainly and substantially be placed on the writing: *Weil v. Schwartz*, 21 Mo. App. 372.

A representation respecting the solvency of a third person is little less than a promise to answer for his debts. Hence holding the maker liable therefor comes near trenching upon the statute of frauds, when the representation rests in parol: See *Savage v. Jackson*, 19 Ga. 305; *Ashlin v. White*, Holt, 387; *Evans v. Bickwell*, 6 Ves. 174, 188. Statutes requiring such representations to be in writing seem to be constructed strictly, as affording protection to fraud: *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338; citing *Hodgin v. Bryant*, 114 Ind. 401, 16 N. E. 815; *Bush v. Sprague*, 51 Mich. 41, 16 N. W. 222. Such statutes cannot apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it: *Hess v. Culver*, 77 Mich. 598, 18 Am. St. Rep. 421, 43 N. W. 994. Where the statute expressly declares that the representations shall be in writing, the facts which conduce to establish the representations may be outside the writing, and these may be established by parol evidence: *Iasigi v. Brown*, 17 How. 183, 194.

Misrepresentations as to the pecuniary responsibility of another must be statements of fact as contradistinguished from mere promises, estimates, or opinions, in order to charge the maker with liability: *Robbins v. Barton*, 50 Kan. 120, 31 Pac. 686; *Redpath v. Lawrence*, 42 Mo. App. 101; *Gallagher v. Brunel*, 6 Cow. 346. As illustrating what expressions amount to representations, see *Robbins v. Barton*, 50 Kan. 120, 31 Pac. 686; *Crown v. Brown*, 30 Vt. 707; *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338.

Moreover, the statements must be certain and definite: *Redpath v. Lawrence*, 42 Mo. App. 101; 1 Bigelow on Fraud, 481; citing *Haycraft v. Creasy*, 2 East, 92; *Gainsford v. Blachford*, 7 Price, 549; see, also, *Russell v. Clark*, 7 Cranch, 69; though it seems they need not be so definite as where the representations are made directly by the party obtaining credit, there being a marked difference in this re-

spect between the case of a party who represents that another can safely be trusted and given credit, and the case of a party who makes the same representations about himself: *Lyon v. Briggs*, 14 R. I. 222, 51 Am. Rep. 372.

The question of certainty of statement often arises in respect to the amount of credit. The supreme court of Georgia has held that a representation that a third person may be safely credited creates no liability, unless the amount for which it is safe to credit is stated with reasonable certainty: *Newsom v. Jackson*, 26 Ga. 241, 71 Am. Dec. 206; *Hopkins v. Allen*, 28 Ga. 392; *Glover v. Townsend*, 30 Ga. 90. And these cases are approved in *Redpath v. Lawrence*, 42 Mo. App. 101.

But in *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338, 342, it is said that "the cases of *Hopkins v. Cooper*, 28 Ga. 392, and *Glover v. Townsend*, 30 Ga. 90, are cited in support of the proposition that the representations are not actionable unless they indicate to a reasonable certainty the amount for which it will be safe to extend credit. As applied to the facts declared upon, the conclusion reached by the court in the first of those cases is undoubtedly correct, but the principle announced in both cases is not in harmony with the current of authority. In *Boyd v. Browne*, 6 Pa. St. 310, the representation was that the party seeking credit was 'a sober, industrious man, worthy of credit, and able to pay,' and was held sufficient to sustain the action. In *Addington v. Allen*, 11 Wend. 374, the defendant was held liable upon a letter which stated in general terms that the person who sought credit was a merchant of some years' standing, and that any assistance given him in the way of buying goods would be thankfully acknowledged by the writer. In *Tatton v. Wade*, 86 Eng. Com. L. 370, the representation was made concerning one who wished to rent apartments, and its purport was that the plaintiff 'need be under no apprehension of his honesty,' and that he 'held a very responsible situation.' In *Kimball v. Comstock*, 14 Gray, 508, the defendant was charged with having falsely and fraudulently represented of another that 'he was possessed of a large amount of property and entitled to credit.' "

An inquiry as to the solvency of another has reference only to his financial responsibility, and the ability of the creditor to make his debt by legal process in the ordinary form. It does not refer to the moral character or trustworthiness of the party: *Well v. Schwartz*, 21 Mo. App. 372.

Whether a misrepresentation is calculated to inspire and does inspire a false confidence in the pecuniary standing of another is a question for the jury: *Eaton v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Iasigi v. Brown*, 17 How. 183, 196.

The representations are binding on the maker only for a reasonable time. When made in regard to one transaction, they cannot be

extended to other subsequent ones: *Lesem v. Miller* (Kan. App., 1900), 62 Pac. 538; *Thaxter v. Bugbee*, 5 Cush. 221; *De Graves v. Smith*, 2 Camp. 532. See, too, *Newsom v. Jackson*, 26 Ga. 241, 71 Am. Dec. 206.

It would be unreasonable, however, to limit the liability strictly to the very time of the making of the recommendation, unless, perhaps, it referred to a special time or transaction, for it would be as likely to operate at any time during the season, and within a few weeks or months, as at the time when given. What is a reasonable time is for the jury to decide: *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551.

Fraud may consist in the suppression of what is true as well as in the representation of what is false. If one, professing to answer a question touching the financial ability of another, selects those facts which are likely to inspire a credit, and willfully suppresses others, with a view to giving such person a credit to which he is not entitled, an action for deceit will lie therefor: *Rheem v. Naugatuck Wheel Co.*, 33 Pa. St. 358; *Browning v. National Capital Bank*, 13 App. D. C. 1; *Tapp v. Lee*, 3 Bos. & P. 367. Though such inquiries need not be answered, yet one undertaking to do so is not at liberty to suppress a material fact within his knowledge: *Viele v. Goss*, 49 Barb. 96. Still a suppression of such fact is not a legal fraud. Although evidence of fraud, it is not conclusive: *Bokee v. Walker*, 14 Pa. St. 139.

A father was held liable, in *Kidney v. Stoddard*, 7 Met. 252, for concealing the minority of his son in recommending him for credit, on the ground of an intentional concealment of material fact with the design to obtain credit for his son, which he knew could not be obtained if the fact of infancy were known.

Where a defendant, in his reply, disclaims all knowledge of the details of the business of the party inquired about, and further implies that he is unwilling to take the responsibility of saying such party is of good standing, but states one fact, which is true—namely, that such party has paid his notes at maturity—he cannot be held liable for nondisclosure of other and independent information from which an inference might be drawn different from that naturally to be drawn from the fact represented: *Potts v. Chapin*, 133 Mass. 276.

And where a letter of inquiry induces the one to whom it is addressed to suppose that information is not desired about certain mortgages, which are of record, and that the inquirer has knowledge of the business relations between the parties to such mortgages, the omission to give information of such liens cannot be considered as made with fraudulent intent: *Babcock v. Libbey*, 82 N. Y. 154.

If a bank is inquired of as to the business character and responsibility of a person, the bank is under no obligation to disclose a con-

siderable indebtedness to it by such person arising from his ordinary business transactions, when the bank has no reason to question his financial ability or integrity: *Randolph v. Allen*, 73 Fed. 23.

One who is defrauded through false representations respecting the solvency of another is damnified as soon as he is induced to act in the manner occasioning the loss, and may maintain an action therefor at once: *Briggs v. Brushaber*, 43 Mich. 330, 38 Am. Rep. 187, 5 N. W. 383; and it is not necessary to show a judgment and return of execution unsatisfied: *Winter v. Bandel*, 30 Ark. 362, 384.

b. **Statements to and by Commercial Agencies.**—One furnishing information to a commercial agency as to his means or pecuniary responsibility can have no other motive than to enable the agency to communicate such information to persons who may be interested in obtaining it for their guidance. And if he makes a false statement with a view to obtain a credit to which he is not entitled, and thus defraud those who may resort to the agency, and, in reliance upon the false information there lodged, extend a credit to him, his liability is the same as if he had made the representation directly to the parties injured: *Soper Lumber Co. v. Halstead*, 73 Conn. 547, 48 Atl. 425; *Moyer v. Lederer*, 50 Ill. App. 94; *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Genessee Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. 790; *Mooney v. Davis*, 75 Mich. 188, 13 Am. St. Rep. 425, 42 N. W. 802; *Holmes v. Harrington*, 20 Mo. App. 661; *John V. Farwell Co. v. Boyce*, 17 Mont. 83, 42 Pac. 98; *Eaton v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Humphrey v. Smith*, 39 N. Y. Supp. 1055, 7 App. Div. 442; *Converse v. Sickles*, 40 N. Y. Supp. 971, 17 Misc. Rep. 169, affirmed in 161 N. Y. 666, 57 N. E. 1107; *Wilmont v. Lyon*, 11 Ohio C. C. 238; *Aultman v. Carr*, 16 Tex. Civ. App. 430, 42 S. W. 614.

A vendor may rescind a sale made on the faith of false reports to an agency: *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Naugatuck Cutlery Co. v. Babcock*, 22 Hun, 481, 485; *Gainsville Nat. Bank v. Bamberger*, 77 Tex. 48, 19 Am. St. Rep. 738, 13 S. W. 959; or he may hold the vendee liable in damages: *Hinchman v. Weeks*, 85 Mich. 533, 48 N. W. 790; *Eaton v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389.

A sale may be rescinded where a merchant, in reply to a request for a statement of his financial condition, says he is not prepared to furnish it, but refers the seller to the reports of a mercantile agency where he is greatly overrated: *Hiller v. Ellis*, 72 Miss. 701, 18 South. 95; or where the buyer refers the seller to a false rating given him by an agency, though the rating is not based upon any statement of the buyer: *P. Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316.

But a sale cannot be rescinded when a buyer, upon the request of an agency, makes a statement of his pecuniary responsibility

which is reported by the agency, together with its own conclusions, to the seller, and he acts on such report as a whole, and not particularly on the faith of the buyer's statement: *Poska v. Stearns*, 56 Neb. 541, 71 Am. St. Rep. 688, 76 N. W. 1078; nor when the seller only alleges that he was informed by an agency that the buyers had represented that they were worth a certain amount, whereas they were insolvent: *Dorman v. Weakley* (Tenn.), 89 S. W. 890; nor when a firm, in making its statement to an agency, left blank a space for "loans from friends or relatives or any other obligations," where each partner had borrowed on his individual note from his wife and put the money into the business: *Vermont Marble Co. v. Smith*, 13 Ind. App. 457, 41 N. E. 973.

Fraud cannot be implied from the fact that a firm whose business consists largely in loaning money on real estate, and taking mortgages therefor, and selling them, does not mention, in its statement to an agency, its liability as guarantor of mortgages sold: *Bradley v. Seaboard Nat. Bank*, 62 N. Y. Supp. 51, 46 App. Div. 550.

A statement made to a mercantile agency as to one's financial status is not a mere expression of opinion, but is a declaration of material fact: *Gainsville Nat. Bank v. Bamberger*, 77 Tex. 48, 19 Am. St. Rep. 738, 18 S. W. 959. Yet if the statement is made expressly as an opinion only, it cannot be regarded as a representation of fact: *Cohn v. Broadhead*, 51 Neb. 834, 71 N. W. 747.

There must be a reliance, by the complaining party, on the false statements, else he is not entitled to relief or redress. If the representation is not communicated to a vendor, or if he has no knowledge of it until after the consummation of the contract of sale, clearly he has no right of action or of rescission: *Robinson v. Levi*, 81 Ala. 134, 1 South. 554; *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373; *Tindle v. Birkett*, 67 N. Y. Supp. 1017, 57 App. Div. 450; *Manhattan Brass Co. v. Reger*, 168 Pa. St. 644, 32 Atl. 64.

A sale made on the faith of the entire report of an agency concerning the standing of the buyer, and not particularly in reliance of a statement made by him to the agency, cannot be rescinded because such statement is false: *Poska v. Stearns*, 56 Neb. 541, 71 Am. St. Rep. 688, 76 N. W. 1078; *Berkson v. Heldman*, 58 Neb. 595, 79 N. W. 162. However, it has been held that if a vendor relies partly on a false statement made by the vendee to an agency, and partly on the report of the agency, he may rescind: *Lowdon v. Fisk* (Tex. Civ. App.), 27 S. W. 180.

The fact that a seller receives other information affecting a buyer's standing, after receiving the report of an agency based on the buyer's statements, raises no presumption of law that, in making the sale, he did not rely on the report of the agency: *Richardson etc. Co. v. Goodkind*, 22 Mont. 462, 56 Pac. 1079.

Every variation in a trader's pecuniary circumstances, after having made a statement to commercial agencies, need not be reported to them. If a considerable time elapses, and no new statements are made, it cannot be said that, if his condition is changed, he is guilty of fraud. Unless he knows, or should know, that credit is extended on the strength of the original ratings, or is aware that he will become insolvent, or obliged to suspend, he is not bound to give notice of a change for the worse in his affairs: *Burchinell v. Hirsh*, 5 Colo. App. 500, 39 Pac. 852; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 830; *Reid v. Kempe*, 74 Minn. 474, 77 N. W. 412; *Strickland v. Willis* (Tex. Civ. App.), 43 S. W. 602.

If a buyer reduces his indebtedness, between the time when he made a statement and when it is communicated to the seller, so that his indebtedness falls below the amount stated, the fact that the statement was false when made does not prejudice the seller: *Hamburger v. Lusky* (Tenn.), 56 S. W. 24.

Representations by a trader respecting his pecuniary responsibility made to mercantile agencies as a basis for obtaining credit are regarded, to some extent, as continuous in their effect. They need not be made at exactly the time of the sale. Still they should be considered as continuing for a reasonable time only: *Claffin v. Flack*, 36 N. Y. St. Rep. 728, 18 N. Y. Supp. 269; *Bradley v. Seaboard Nat. Bank*, 62 N. Y. Supp. 51, 46 App. Div. 550; *Wilmot v. Lyon*, 11 Ohio C. C. 238; *Lowdon v. Fisk* (Tex. Civ. App.), 27 S. W. 180. Some authorities seem to hold that the representations must be connected proximately in point of time with the transaction in which the plaintiff is deceived: *Macullar v. McKinley*, 99 N. Y. 853, 2 N. E. 9.

It has been held that reliance may be placed on statements made three months and a half prior to the transaction: *Humphrey v. Smith*, 39 N. Y. Supp. 1055, 7 App. Div. 442; five months: *Naugatuck Cutlery Co. v. Babcock*, 22 Hun, 481; six months: *Mooney v. Davis*, 75 Mich. 188, 13 Am. St. Rep. 425, 42 N. W. 802; eight months: *Bliss v. Sickles*, 21 N. Y. Supp. 273, 66 Hun, 633; twelve and six months: *Lowdon v. Fisk* (Tex. Civ. App.), 27 S. W. 180; or one year: *P. Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 816. On the other hand, it has been held that reliance may not be placed on statements made to an agency over two years prior to the transaction: *Sharpless v. Gummey*, 166 Pa. St. 199, 30 Atl. 1127; or even six months: *Macullar v. McKinley*, 99 N. Y. 853, 2 N. E. 9.

IV. Representations by Promoters of Corporations.

a. **Oral Statements and Speeches.**—Misrepresentations made by the promoters of a corporation at a public meeting called for the purpose of procuring subscriptions to stock will not, generally

speaking, vitiate a subscription made in reliance thereon by one of the class to whom the representations are made, where such representations are not expressly authorized by the corporation. There would be little stability to corporations or safety to stockholders under any other doctrine: *Smith v. Tallahassee etc. Co.*, 30 Ala. 650; *Mississippi etc. R. R. Co. v. Cross*, 20 Ark. 443, 454; *First Nat. Bank v. Hurford*, 29 Iowa, 579; *Vicksburg etc. R. R. Co. v. McKean*, 12 La. Ann. 638; *St. Johns Mfg. Co. v. Munger*, 106 Mich. 90, 58 Am. St. Rep. 468, 64 N. W. 3; *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 336. Compare *Atlanta etc. R. R. Co. v. Hodnett*, 36 Ga. 669; *Weems v. Georgia etc. R. R. Co.*, 88 Ga. 303, 14 S. E. 583.

b. *Prospectuses*.—The question of indirect fraud assumes no small importance in the matter of prospectuses. Those who issue a prospectus, holding out to the public the great advantages that will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with scrupulous accuracy, and not only to abstain from stating as facts that which is not so, but to omit no one fact within their knowledge the existence of which might affect the nature, extent, or quality of the privileges and advantages that the prospectus holds out as inducements to take shares: *New Brunswick etc. Ry. Co. v. Muggeridge*, 1 Drew & S. 363.

Nevertheless, in an advertisement of this kind some allowance must always be made for the sanguine expectations of the promoters of the adventure, and no prudent man will accept the prospects held out by them without considerable abatement. But although some high coloring, and even exaggeration, may be expected, yet no misstatement or concealment ought to be permitted: *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 Eng. & I. App. 99; *Henderson v. Lacon*, L. R. 5 Eq. 249; *Gerhard v. Bates*, 2 El. & B. 475; *Denton v. Macneil*, L. R. 2 Eq. 352.

If it can be shown that a material misrepresentation or concealment is made in a prospectus respecting the enterprise, which results in injury to those induced to subscribe for stock, they are entitled to a rescission of their contract of subscription: *In re Reese River etc. Min. Co.*, L. R. 2 Ch. 604, 609; *In re Coal etc. Co.*, L. R. 1 Ch. D. 182, 189; *In re Metropolitan Assn.*, L. R. [1892] 3 Ch. D. 1; *Central Ry. Co. v. Kisch*, L. R. 2 Eng. & I. App. 99. Or they may hold the promoters or directors personally liable: *Walker v. Anglo-American Mortg. etc. Co.*, 72 Hun, 334, 25 N. Y. Supp. 432; *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505; *Morgan v. Skiddy*, 62 N. Y. 319; monographic note to *Cottrell v. Krum*, 18 Am. St. Rep. 562; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. D. 78. Or an action of deceit may be maintained against the corporation: *Benedict v. Guardian Trust Co.*, 68 N. Y. Supp. 1082, 58 App. Div. 302.

It is immaterial that no specific statement is false, if the general impression conveyed by the prospectus is false: *Aaron v. Twiss* L. R. [1896] App. Cas. 372. Though if the language is susceptible of two meanings, a subscriber to stock must ascertain which meaning is intended: *Smith v. Chadwick*, L. R. 9 App. Cas. 187; *Hallows v. Fernie*, L. R. 3 Ch. App. 467.

A subscriber must act promptly, to entitle him to relief from a subscription to stock procured by fraudulent statements or prospectuses. An unreasonable delay tending to show acquiescence on his part is fatal: *American Bldg. etc. Assn. v. Rainbolt*, 48 Neb. 434, 67 N. W. 493; *Weisinger v. Richmond etc. Mach. Co.*, 90 Va. 795, 20 S. E. 361; *Bartol v. Walton etc. Co.*, 92 Fed. 13; *Sharp-ley v. South etc. Ry. Co.*, L. R. 2 Ch. D. 663.

The inquiry next suggested is as to who is entitled to rely on a prospectus, and, having relied on a fraudulent one to his injury, may seek redress. It is not necessary that the false representations should be made directly to the injured party. It is enough that they are contained in a document which is meant to be circulated among a class of persons who are likely to be deceived. The representations are regarded as made to each person comprehended within the class of persons who are designed to be influenced by the prospectus. When a prospectus of this character is issued, no other relation of privity between the parties need be shown except that created by the wrongful act of the defendant in issuing and circulating the prospectus, and the resulting injury to the plaintiff: *Morgan v. Skiddy*, 62 N. Y. 319, 325; *Clarke v. Dickson*, 6 Com. B., N. S., 453.

But it must be shown that the representations were made to influence the plaintiff, or of a class of persons to which he belongs. Thus, it has been held that false representations in a prospectus to induce subscriptions to stock on the organization of a company will not sustain an action in favor of one who was not a party to the original subscription, but who, afterward having seen the prospectus and relying on it, purchased shares in the market: *Peek v. Gurney*, L. R. 6 Eng. & L. App. 377. This case has been favorably cited to analogous propositions in *Brackett v. Griswold*, 112 N. Y. 454, 471, 20 N. E. 376; *Haines v. Franklin*, 87 Fed. 139, 143.

However, where subsequently to the issue of a prospectus, the party causes to be published a false representation to the same effect as that of the prospectus, with intent to induce the purchase of shares, he is liable to anyone who, having received a prospectus, purchases shares on the faith of the representation so published, and sustains loss thereby: *Andrews v. Mockford*, L. R. [1896] 1 Q. B. 372.

The false representations need not be the sole inducement to the purchase of shares: *Morgan v. Skiddy*, 62 N. Y. 319, 328;

Clarke v. Dickson, 6 Com. B., N. S., 452. Still they must be relied on: *Shrewsbury v. Blount*, 2 Man. & G. 475. They must be the proximate cause of the purchase: *Barrett's Case*, 3 De Gex, J. & S. 80.

The distinction between representations of fact and of opinion obtains in cases of fraudulent prospectuses the same as in other cases of fraud. Mere opinions, estimates, or promissory statements contained in them, though unfounded, will not invalidate a transaction entered into in reliance thereon: *Max Meadows Land etc. Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Banque Franco Egyptienne v. Brown*, 34 Fed. 162. See, also, *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. 623; *Holdredge v. Webb*, 64 Barb. 9.

The question of fraudulent intent in the issuance of prospectuses is a very material consideration as it is in other species of fraud. Must the intent to deceive be actual, or may it be implied from false statements, not known to be untrue, but made recklessly or inconsiderately? We cannot do better in reply than to quote from Lord Herschell, in *Derry v. Peek*, L. R. 14 App. Cas. 337, 374. He says: "I think the authorities establish the following propositions: First, in order to sustain an action for deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct classes, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

c. *Statement in Stock Exchange*.—If a director causes false representations to be made to a committee of the stock exchange, concerning the stock of his company, he is liable to one who buys shares, relying on the representations, on the stock exchange from third parties. All persons buying shares on the stock exchange must be considered as persons to whom it was contemplated the representations should be made: *Bedford v. Bagshaw*, 4 Hurl. & N. 538.

V. Representations of the Condition of Corporations.

a. *Banks and Corporations, Generally*.—Closely analogous to the publication of fraudulent prospectuses, in the consequences springing therefrom, is the issuance of false reports of the condition of

corporations. Before making representations as to the condition of the corporation as inducements to take stock therein or extend credit thereto, it is the duty of officers to use reasonable diligence to know that the representations are true, and they will be presumed to have used such diligence, and to possess the knowledge which its exercise would bring to them: *Hubbard v. Weare*, 79 Iowa, 678, 687, 44 N. W. 915. If false and fraudulent statements are put forth under the authority of directors, it is not necessary that they should know them to be such; it is their duty to know them to be true, and they are liable for damages sustained by anyone dealing with the corporation, relying on the truth of such reports: *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827.

Probably the above rule laid down by the North Carolina court should be taken with some modification. It would seem more nearly accurate to say that if directors issue false statements concerning the corporation, which, while they do not know them to be false, they ought to have known, and by the use of ordinary diligence, such as it was their duty to exercise, might have known, they are liable to those relying on such reports to their injury: *Prewitt v. Trimble*, 92 Ky. 176, 36 Am. St. Rep. 586, 17 S. W. 356; *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Seale v. Baker*, 70 Tex. 289, 8 Am. St. Rep. 592, 7 S. W. 242; *Kinkler v. Junica*, 84 Tex. 116, 19 S. W. 359. A statement made in good faith, and after due care in ascertaining the condition of the company, will not, it is believed, render the directors liable, though it proves untrue: *Foster v. Gibson*, 18 Ky. Law Rep. 716, 38 S. W. 144; *Pieratt v. Young*, 20 Ky. Law Rep. 1815, 49 S. W. 964; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Kountze v. Kennedy*, 147 N. Y. 124, 49 Am. St. Rep. 651, 41 N. E. 414. It is otherwise where the statement is made by a corporate officer without any reasonable knowledge, bona fide, to believe it to be true, or where made in reckless disregard of its truth or falsity: *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861.

Where the directors, managers, or officers of a corporation put forth a false and fraudulent statement or report to induce the taking of stock, they are liable to those who, relying thereon, purchase shares to their injury: *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; *Trimble v. Ward*, 97 Ky. 748, 31 S. W. 864; *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120; *Parsons v. Johnson*, 50 N. Y. Supp. 780, 28 App. Div. 1; and one of them cannot escape on the ground that no special reliance was placed on him: *Gerner v. Yates* (Neb., 1900), 84 N. W. 596. If the president of a bank, in selling his stock, refers to a false published statement over his signature, he is liable to the purchaser: *Ward v. Trimble*, 19 Ky. Law Rep. 1801, 44 S. W. 450.

The measure of damages which one may recover from a bank, who has purchased stock therein in reliance upon its yearly published statement, which is false, is the difference between the value of the stock if the report were true, and its actual value: *Exchange Bank v. Gaitskill*, 18 Ky. Law Rep. 532, 37 S. W. 160.

The fraud and injury must be connected in order to enable one to recover in cases of this kind. The plaintiff must show that he acted upon the faith of the representations. If he acts in ignorance of false reports or statements, or without relying on them, clearly he has no cause of action: *Priest v. White*, 89 Mo. 609, 1 S. W. 361; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 370.

Moreover, the plaintiff must bring himself within the class of persons for whom the representations were intended, and who had a right to rely on them: *Morse v. Swits*, 19 How. Pr. 275, 283; *Hindman v. First Nat. Bank*, 86 Fed. 1013, 1019. Thus, in *First Nat. Bank v. Sowles*, 46 Fed. 731, the directors, during a run on the bank, signed and placed conspicuously in the public banking-room a statement that the bank was sound. The president of the plaintiff bank loaned money to the defendants partly on the strength of this notice. The defendants were held not liable, the court saying "that such a representation was so made somewhere, at some time, to some person, by the persons sought to be charged, is not sufficient; it must be made to the persons seeking to charge them. . . . This writing was not delivered to, nor to anyone for, the plaintiff, and the plaintiff was not one for whom it was obviously intended."

So one bank is not liable to another bank where its officers distribute to its stockholders a false statement of its financial condition, and the second, in reliance thereon, discounts a note solely on the security of the stock of the first bank, which turns out worthless: *Merchants' Nat. Bank v. Armstrong*, 65 Fed. 932.

And if the officers of a foreign corporation file a certificate stating the amount of capital subscribed for and the amount paid, as required by statute, one who finds it on file and is induced by misstatements therein to take the note of the corporation, cannot maintain deceit against the officers. Such certificate is not addressed to, or intended for, the public, but is to obtain the right to do business in the state: *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267. But where the reports of the financial condition of corporations required by statute to be filed with the secretary of state and the county clerk are intended as a means of furnishing information to those dealing with the corporation, such persons have a right to rely on the statements: *Silberman v. Munroe*, 104 Mich. 352, 62 N. W. 555.

The directors of a national bank who knowingly make and publish false statements and reports of the financial condition of the bank, with intent to deceive, which are believed and acted upon by

parties to their damage, are liable therefor: *Stuart v. Bank of Staplehurst*, 57 Neb. 569, 78 N. W. 298. The statements of such bank required by the comptroller and published in the newspapers have among their purposes that of the conveyance of information to those persons, each or all, who contemplate dealings with the bank in any way in which its financial condition enters as a vital matter: *Stuart v. Bank of Staplehurst*, 57 Neb. 569, 78 N. W. 298. And one contemplating the purchase of stock in the bank is entitled to rely on such publications equally with a depositor or note holder: *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 884.

In an action against directors for making a false statement of the bank's condition which induced the plaintiff to leave a deposit in the bank, it must be alleged that but for such statements the plaintiff would have withdrawn his deposit. It is not sufficient to aver that he was induced to remain a depositor in reliance on the statements: *Pieratt v. Young*, 20 Ky. Law Rep. 1815, 49 S. W. 964; *Brady v. Evans*, 78 Fed. 558.

The publication by savings bank directors that the directors and stockholders are personally liable for its debts, which is false, gives one who makes a deposit on the faith of the publication an action for deceit against the directors: *Westervelt v. Demarest*, 46 N. J. L. 37, 50 Am. Rep. 400.

b. *Insurance Companies.*—The directors of an insurance company are liable personally to an assured, who, by reason of the insolvency of the company, has been unable to recover upon his policy, where they have fraudulently made and published false representations as to the financial condition of the company, whereby the plaintiff was induced to insure therein. It is no defense that they were acting officially, or that there was no privity of contract between them and the plaintiff: *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255. Although no damage, beyond the payment of premiums, has been sustained, an action may be maintained for false representations as to the affairs of an insurance company, by which one has been induced to insure therein: *Pontifex v. Bignold*, 3 Man. & G. 63.

Where one has been induced to effect insurance with a company through false advertisements and pamphlets as to the advantages that would accrue to those insuring with it, and the company refuses to fulfill its contract, the insured may maintain an action for fraud and recover the amount of money paid in with interest: *Bohrschneider v. Knickerbocker Life Ins. Co.*, 76 N. Y. 216, 32 Am. Rep. 290.

PINKHAM v. PINKHAM.

[95 Me. 71, 49 Atl. 48.]

A WIFE CANNOT BAR HER DOWER or her right and interest by descent by simply contracting mutual releases with her husband. (p. 393.)

STATUTES EXTENDING THE POWER OF WIVES TO contract with their husbands are construed strictly as in derogation of the common law, and as modifying a long approved policy. (p. 393.)

IF JOINTURE OR PECUNIARY PROVISION IS MADE FOR A WIFE, even with her consent, and her dower or right and interest by descent will be thereby barred, she may waive the provision and save her interest. (p. 393.)

F. J. C. Little, for the plaintiffs.

H. M. Heath and C. L. Andrews, for the defendant.

74 SAVAGE, J. In this writ of entry the demandants are the two sons of Elisha F. Pinkham, who died seised of the demanded premises, April 24, 1899; the defendant is his widow. The widow claims a one-third interest in the premises by statutory descent under the provisions of section 1 of chapter 157 of the Public Laws of 1895. And it is agreed that if the widow's claim is sustained, the demandants are entitled to judgment for two-thirds undivided of the premises; otherwise, for the whole.

75 The demandants claim that the defendant is barred of her statutory interest by the following agreement, made while Elisha F. Pinkham and the defendant were intermarried, and presumably while they were living together as husband and wife:

"By mutual consent and agreement this day entered into by and between Elisha F. Pinkham and Frances O. Pinkham, both of Augusta, Maine, man and wife, and for a valuable consideration paid by the one unto the other, receipt of which is hereby acknowledged, each does hereby release and discharge, convey and transfer unto the other all of his right, title, and interest in dower of his or her real estate of which he or she is now seised or possessed, and of which he or she may die seised or possessed. And likewise do further hereby acknowledge full and complete satisfaction for and of each in the other's personal estate at time of his or her decease, hereby waiving

and canceling and discharging each unto the other all claim and right of claim which each may have at the time of the other's decease in each other's estate, whether by allowance or widow's or widower's thirds, under general laws of the state, excepting this writing shall not cut nor interfere with any provision made in the will of the party who shall first decease, if any such provision shall be made in favor of the other.

"In witness whereof we have hereunto interchangeably set our hands and seals this 12th day of February, 1896.

"ELISHA F. PINKHAM. [Seal]

"FRANCES O. PINKHAM. [Seal]"

In this agreement the parties make use of the word "dower." Chapter 157 of the Public Laws of 1895 abolished dower, and substituted therefor title and interest by descent, an estate in fee. That statute was not in force as to these parties when this agreement was made, but it was in force when Mr. Pinkham died. But we think it is clear that, in using the word "dower," the parties had in mind such interest as the defendant might have in her husband's real estate at his death, be it "dower" under the old statutes, or "right and interest by descent" under the new. And thus we construe the agreement.

⁷⁶ But is the agreement valid? We think not. At common law a wife could not bar her dower by a release to her husband during coverture: *Rowe v. Hamilton*, 3 Me. 63. If such power now exists, it must be by reason of some enabling statute: *Haggett v. Hurley*, 91 Me. 542, 40 Atl. 561. If the power be sought in the general statutes extending the powers of wives to contract with their husbands, we think the search will be unavailing. Certainly, no such power is expressly given, and we think it is not given by any fair intendment. The principles controlling the construction of these statutes have recently been elaborately expounded in *Haggett v. Hurley*, 91 Me. 542, 40 Atl. 561, and we need not repeat them. Such statutes, as was said in that case, "must be construed strictly as in derogation of the common law, and as modifying a long approved policy."

Now, because the statutes empower a wife to convey her real estate to her husband, a matter of bargain and sale, or gift, it does not follow that she may divest herself of her dower right, or, as we now say, her right and interest by descent, by simply contracting mutual releases with her husband. The two matters are different. The right and interest by descent arise by

reason of the marital relation and continue, unless barred, as long as that relation exists. It is not barred by a sale to the husband, for if the wife convey her real estate to her husband, her inchoate right by descent springs at once into existence. It is not defeated nor barred.

The law jealously regards the rights of a wife in the estate of her husband. She may not be barred by his deed or his will, unless she joins in the one, or is willing to accept the provisions of the other. She is even protected against her own too easily persuaded confidence in her husband, her own improvident contracts with him. For if, during coverture, jointure or pecuniary provision is made for her, even with her consent, and her dower or right and interest by descent would be thereby barred, she may waive the provision, and save her interest: Rev. Stats., c. 103, sec. 9; Pub. Laws 1895, c. 157, sec. 4.

Had it been the intention of the legislature to grant to wives a power of so serious a character and of such doubtful utility to them ⁷⁷ as the irrevocable power claimed in this case would be, we think that intention would have been more clearly expressed.

The legislature has, however, permitted the barring of dower or the interest by descent in certain specific ways, and with certain safeguards. But none of these statutory methods were adopted in this case. This is not a statutory "marriage settlement," because it is not an ante-nuptial settlement executed in the presence of two witnesses: Rev. Stats., c. 61, sec. 6; *Wentworth v. Wentworth*, 69 Me. 247. Nor is it a "jointure": Rev. Stats., c. 103, sec. 7; *Vance v. Vance*, 21 Me. 364; nor is it a joinder in a conveyance made by the husband: Rev. Stats., c. 103, sec. 6; nor is it a "pecuniary provision" (Rev. Stats., c. 103, sec. 8), because the provision is not "pecuniary": *Davis v. Davis*, 61 Me. 395; *Bouvier's Law Dictionary*, tit. "Pecuniary." In *Woods v. Woods*, 77 Me. 434, 1 Atl. 193, cited and relied upon by the learned counsel for the demandants, the provision was, in part at least, pecuniary, "one thousand dollars in money." And upon this fact the decision of the court was expressly based.

Besides, if the agreement in the case at bar could be held to be a pecuniary provision, the case shows that the widow seasonably elected to waive the provision: Pub. Laws 1895, c. 157, sec. 4. And this she could do, for the provision was made after marriage: Rev. Stats., c. 103, sec. 9.

The defendant, therefore, took one-third in common and undivided of the demanded premises as her right and interest by descent from her husband, and the demandants are entitled to judgment for the remainder.

Judgment for demandants for two-thirds in common and undivided of the demanded premises.

A Wife may Contract for the Relinquishment of Her Dower Right in her husband's lands in consideration of a tract of land deeded by him to her: *McBreen v. McBreen*, 154 Mo. 823, 77 Am. St. Rep. 758, 55 S. W. 463. However, an agreement between them without the intervention of a trustee, whereby one relinquishes all claim against the other, is void in many of the states: See the monographic note to *In re Ingram*, 12 Am. St. Rep. 92.

STATE v. ROGERS.

[95 Me. 94, 49 Atl. 564.]

CONSTITUTIONAL LAW.—IT IS THE DUTY OF ONE DEPARTMENT OF GOVERNMENT to presume that another has acted within its legitimate province. (p. 396.)

PURE FOOD LAW—INTERSTATE COMMERCE.—A statute which prohibits the manufacture and sale of "any substance or compound made in imitation of yellow butter," and not made "wholly of cream or milk," is constitutional, though intended to prohibit the sale of such products imported from other states and sold in the original packages. (pp. 396, 397.)

PURE FOOD LAW.—IN A PROSECUTION FOR SELLING a substance made in imitation of butter, it is not incumbent on the government to show that the defendant had knowledge of the imitation, or had an intention to deceive the purchaser. (p. 398.)

George E. McCann, for the state.

E. M. Briggs, for the defendant.

⁹⁷ **WHITEHOUSE, J.** This was an indictment against the defendant for selling a quantity "of a certain substance made in imitation of yellow butter, and not made exclusively and wholly of cream or milk, and then and there containing fats, oil, and grease not produced from milk or cream." The indictment was based on section 3 of chapter 128 of the Revised Statutes, entitled "Offenses against the public health, safety, and policy," as amended by chapter 297 of the Laws of 1885 and chapter 143 of the Laws of 1895.

That part of the statute involved in a decision of this case is as follows: "Whoever, by himself or his agent, manufactures, sells, exposes for sale, or has in his possession with intent to sell, or takes orders for the future delivery of an article, substance, or compound ⁹⁸ made in imitation of yellow butter or cheese, and not made exclusively or wholly of cream or milk, or containing any fats, oil, or grease not produced from milk or cream, whether said article, substance, or compound be named oleomargarine, butterine, or otherwise named, forfeits for the first offense one hundred dollars, and for the second and each subsequent offense, two hundred dollars, to be recovered by indictment with costs, one-third to go to the complainant and the balance to the state."

The presiding judge instructed the jury, against the defendant's request for contrary rulings, that the statute was constitutional and valid; and that it was not incumbent on the government to show that the defendant had knowledge that the substance sold by him was oleomargarine, or a substance "not made exclusively and wholly of milk or cream," or to prove that there was an intention on his part to deceive the purchaser by selling him, for pure butter, a substance which resembled butter, but which in fact was not butter.

The jury returned a verdict of guilty, and the case comes to this court on the defendant's exceptions to these instructions.

1. The power of the judicial department of the government to prevent the enforcement of a legislative enactment, by declaring it unconstitutional and void, is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. It is the duty of one department to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons.

Under the constitution of this state "the legislature shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state not repugnant to this constitution, nor to that of the United States": Art. 4, pt. 3, sec. 1.

It is important, in the first place, to observe the precise scope and purpose of the statute, the construction and validity of which are to be considered in this case. It will be noted that it does not ⁹⁹ assume to impose an absolute prohibition on the manufacture or sale of "oleomargarine" or "butterine" in its

avowed character as such. It does not seek to interfere with any inherent right or privilege the people may have to engage in the manufacture and sale of any wholesome product or compound designed simply to be used as a substitute for butter, provided it is not made in imitation of yellow butter, and the true character of it is openly designated and published. It only prohibits the manufacture and sale of "any substance or compound made in imitation of yellow butter," and not made "wholly of cream or milk." As stated by the court in *People v. Arensberg*, 105 N. Y. 130, 59 Am. Rep. 483, 11 N. E. 279: "It is aimed at a designed and intentional imitation of dairy butter in manufacturing the new product, and not at a resemblance in qualities inherent in the articles themselves and common to both." The statute prohibits the sale of a simulated article put upon the market in such form and color as to be calculated to deceive the purchaser. The obvious purpose of it was to prevent the fraud and deception practiced in selling for genuine yellow butter any spurious article or compound made in imitation of it. Where the resemblance between the external appearance of yellow butter and the counterfeit article is so close that it is not practicable by any ordinary inspection for the purchaser to distinguish the one from the other, and the only effective means of protecting the public against the deception are to be found in the absolute suppression of the business and the entire exclusion of such imitations from the market, the enactment of such a prohibitory statute as the one in question, for the prevention of fraud, the protection of public morals and the promotion of a sound public policy, may well be deemed a reasonable exercise by the legislature of the police powers of the state, and not in conflict with any provision of our state constitution.

Statutes in Massachusetts and New York of precisely the same scope and purpose as ours have been declared by the courts of last resort of those states not to be in conflict with any provision of their constitutions: *Commonwealth v. Huntley* (Plumley's Case), 156 Mass. 236, 30 N. E. 1127; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277. See, also, *State v. Marshall*, 64 N. H. 549, 15 Atl. 210; *State v. Addington*, 77 Mo. 100 110; *State v. Newton*, 50 N. J. L. 534, 14 Atl. 604; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257.

Indeed, the judicial utterances have been so nearly uniform in upholding the validity of all such statutes for the pro-

tection of the people against deception, that it is conceded by the counsel for the defendant in the case at bar that, if our statute could be construed to apply only to products manufactured in the state, it should be held a valid police regulation.

But it is contended that, inasmuch as the statute was manifestly intended to prohibit the sale of all such products, although imported from other states and sold in the original packages, it must be held inoperative and void as repugnant to that clause of the federal constitution conferring upon Congress the power "to regulate commerce with foreign nations and among the several states": Art. 1, cl. 3, sec. 8. But the relation of the statute to the federal constitution is not necessarily brought in question by the facts of this case, as there is no evidence that the substance sold by the defendant was imported from another state. But inasmuch as the statute would obviously be shorn of the principal part of its operation unless it effectually prohibits the sale of such counterfeit products imported from another state and sold in the original package, as well as those manufactured in this state, and as both counsel have requested that the question should be considered and determined in this case, the court may properly state that in *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. Rep. 154, the decision of the supreme court of Massachusetts (*Commonwealth v. Huntley* (*Plumley's Case*), 156 Mass. 236, 30 N. E. 1127, holding that the statute of that state of the same effect as ours was not repugnant to the interstate commerce clause of the federal constitution, was distinctly affirmed in an elaborate opinion by the supreme court of the United States, six of the justices concurring in the majority opinion and three dissenting. In the majority opinion the court say: "We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such ¹⁰¹ coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The constitution of the United States does not secure to anyone the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society, and the states are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any

right secured by the national constitution, and without infringing the authority of the general government. A state enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several states. It is legislation which 'can be most advantageously exercised by the states themselves.'

2. The presiding justice also correctly instructed the jury that if the defendant "sold a compound in imitation of yellow butter, not made wholly and exclusively of cream or milk, or containing any fats, oils, or grease not produced from cream or milk, then he is guilty." It was not incumbent on the government to show knowledge on the part of the defendant that the "article, substance, or compound" sold by him was "not made exclusively and wholly of milk or cream," or to prove an intention on his part to deceive the purchaser. By the plain and simple terms of the statute the act of selling such an imitation of yellow butter, as therein described, is made to constitute the offense. It contains no words indicative of a legislative purpose to make such knowledge or intention an essential element of the offense. The words "knowingly," "intentionally," or "with intent to deceive" are not found in the enactment.

Under statutes prohibiting the sale of intoxicating liquors it is uniformly held that knowledge on the part of the defendant of the intoxicating quality of the liquor is not an essential ingredient of the offense. In *Commonwealth v. Boynton*, 2 Allen, 160, the court say: ¹⁰² "If the defendant purposely sold the liquor, which was in fact intoxicating, he was bound, at his peril, to ascertain the nature of the article which he sold. Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises, unless he could do so lawfully, if he violates the law he incurs the penalty": See, also, *Barnes v. State*, 19 Conn. 398; *State v. Hughes*, 16 R. I. 403, 16 Atl. 911. So as to conviction under statutes prohibiting the sale of adulterated milk or "milk to which water or any foreign substance has been added." The protection of the community against the extensive and skillful frauds practiced in the adulteration of articles of food is a matter of such general importance, and proof of the defendant's knowledge of the adulteration is, in a majority of instances, a matter of such extreme difficulty, that it is deemed reasonable, as well as competent,

for the legislature to require the seller of such articles to take upon himself the responsibility of knowing that they are not adulterated: *Commonwealth v. Farren*, 9 Allen, 489; *State v. Smith*, 10 R. I. 258. And "such is the general rule where acts which are not mala in se are made mala prohibita from motives of public policy, and not because of their moral turpitude, or the criminal intent with which they are committed": *Commonwealth v. Raymond*, 97 Mass. 567. As stated by Peters, C. J., in *State v. Swett*, 87 Me. 99, 47 Am. St. Rep. 306, 32 Atl. 806: "The principle is applied only in minor offenses upon some ground of public policy for the protection of society against abuses which cannot be prevented under any more liberal rule."

In seeking to determine the proper construction to be given to the statute in question in the case at bar, it is necessary to consider the practical result of the interpretation contended for by the defendant. It would be obviously impossible, in a great majority of cases, to prove the defendant's knowledge that the substance sold by him was not made exclusively of milk or cream, and hence the requirement of such proof on the part of the state would necessarily defeat the effective operation of the statute, and destroy its usefulness. In view of the object manifestly sought to be accomplished and the mischief designed to be remedied by the enactment, ¹⁰⁸ it is not reasonable to presume that the legislature intended at the same time to render the act futile and nugatory by making such knowledge on the part of the defendant an essential element of the offense.

Exceptions overruled.

OLEOMARGARINE. AND THE RIGHT OF THE STATES TO REGULATE THE MANUFACTURE AND SALE OF.

- I. Regulation of the Domestic Product.**
- II. The Foreign Product and Interstate Commerce.**

I. Regulation of the Domestic Product.—The legislative crusade against oleomargarine rests on the right of the states, in the exercise of the police power, to protect their citizens from fraud and deception. Conceding that the manufacture and sale of oleomargarine are based upon natural right, and that the product, when properly made, is not harmful, but is a wholesome and nutritious food, yet the fact that it may easily be made to resemble butter, and so as to be harmful, and often is so made and sold, gives a state undoubted authority to adopt reasonable regulations to insure the public against resulting fraud and injury. A state may compel the manufacture and sale of oleomargarine for what it is, and

declare that it shall not be made and sold for what it is not: *State v. Capital City Dairy Co.*, 62 Ohio St. 350, 57 N. E. 62, affirmed by the supreme court of the United States in *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. Rep. 120.

Many of the statutes designed to prevent the sale of oleomargarine in imitation of butter lay various inhibitions on the coloring of the product, in order that the purchaser may be apprised of the nature of the article he is buying. These statutes have been uniformly upheld, though the obvious effect of some is to very seriously cripple, if not practically put an end to, the trade in butter substitutes. Thus, a state may prohibit the coloring of oleomargarine with annatto or like substances that are used in coloring butter: *State v. Bockstruck*, 136 Mo. 835, 38 S. W. 317; *State v. Newton*, 50 N. J. L. 534, 14 Atl. 604; *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820. Or may forbid its manufacture and sale except in its natural state and devoid of artificial coloring: *Commonwealth v. Vandyke*, 13 Pa. Super. Ct. 484; *Commonwealth v. McCann*, 14 Pa. Super. Ct. 221; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. Rep. 120. Then, on the other hand, a state may prohibit the manufacture and sale of oleomargarine unless colored a bright pink: *State v. Horgan*, 55 Minn. 183, 56 N. W. 688; *State v. Marshall*, 64 N. H. 549, 15 Atl. 210; *State v. Myers*, 42 W. Va. 822, 57 Am. St. Rep. 887, 26 S. E. 539; *Armour Packing Co. v. Snyder*, 84 Fed. 136.

Some of the states have adopted more reasonable regulations by requiring that notice be given to the consumer of the character of the substance he is buying by some external distinguishing marks, instead of by the color of the article. The Missouri statute requires that the words "Substitute for Butter" shall be placed on the tub or other receptacle: *State v. Bockstruck*, 136 Mo. 835, 38 S. W. 317. The Maryland statute providing that packages shall be stamped or marked "Oleomargarine" has been upheld as constitutional: *Pierce v. State*, 63 Md. 592; *Wright v. State*, 88 Md. 436: 41 Atl. 795. See, too, *Hames v. People*, 7 Colo. App. 467, 43 Pac. 1047; *Palmer v. State*, 39 Ohio St. 236, 46 Am. Rep. 429. So has the New Jersey statute requiring that a purchaser shall be informed that he is buying oleomargarine, and be given a card or notice printed on which shall be the name of the substance sold and the name and address of the vendor: *Bayles v. Newton*, 50 N. J. L. 549, 18 Atl. 77. And the Massachusetts statute providing that a vender from a wagon shall have on either side of the vehicle a large placard, "Licensed to Sell Oleomargarine," has been sustained: *Commonwealth v. Crane*, 158 Mass. 218, 33 N. E. 388.

A few statutes go so far as absolutely to prohibit the manufacture or sale of oleomargarine, however fairly and openly its character may be avowed and published. The New York statute to this effect was declared unconstitutional as a violation of the fourteenth

amendment in *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29. In upholding the Missouri statute, Mr. Justice Thompson said: "If an article is of such a character that few persons will eat it knowing its real character; if at the same time, it is of such a nature that it can be imposed upon the public as an article of food which is in common use and against which there is no prejudice; and if, in addition to this, there is probable ground for believing that the only way to prevent the public from being defrauded into the purchasing the counterfeit article for the genuine is to prohibit altogether the manufacture and sale of the former—then we think such prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and although its production might be found beneficial to the public, if in buying it they could distinguish it from the production of which it is the imitation": *State v. Addington*, 12 Mo. App. 214, 223. The Pennsylvania statute of similar import was upheld by the United States supreme court in *Powell v. Pennsylvania*, 127 U. S. 678, 1257, 8 Sup. Ct. Rep. 992. The doctrine of this case, as pointed out by Mr. Justice Field, in his dissenting opinion, "is nothing less than the competency of the legislature to prescribe out of different articles of healthy and nutritious food what shall be manufactured and sold within its limits, and what shall not be thus manufactured and sold." As such a statute forbids all sales, it does not contravene the provision of a bill of rights declaring against monopolies: *Wright v. State*, 88 Md. 436, 41 Atl. 795.

It is to be observed of perhaps the majority of the statutes that they do not prohibit the manufacture or sale of all oleomargarine, but only such as is made in imitation of butter. The right to sell it in a distinct form in such a manner as to advise the consumer of its real nature is not restricted or prohibited. Such statutes have been sustained whenever their constitutionality has been called in question: See *Cook v. State*, 110 Ala. 40, 20 South. 360; *Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127; *State v. Bockstruck*, 136 Mo. 335, 33 S. W. 317; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. Rep. 154.

A provision is found in some statutes making it unlawful to furnish oleomargarine to a guest without notifying him. Such a provision is constitutional: *State v. Ball*, 70 N. H. 40, 46 Atl. 50.

II. The Foreign Product and Interstate Commerce.—Oleomargarine has ceased to be a newly discovered food product, and is now considered a legitimate subject of commerce among the states: *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757. Therefore, the fact that it may be adulterated so as to be deleterious to health, or may be made to so resemble butter as to work fraud and deception on consumers, does not justify the legislature in absolutely prohibiting its introduction within the state. A state cannot totally

forbid the introduction within its borders of an article of commerce which is not adulterated, and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated. The bad may be prohibited, but not the pure and healthful: *Fox v. State*, 89 Md. 381, 73 Am. St. Rep. 193, 48 Atl. 943; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757; *State v. Gooch*, 44 Fed. 276; *In re McAllister*, 51 Fed. 282; *Ex parte Scott*, 66 Fed. 45.

However, there is no recognition, under the commerce clause of the federal constitution, of the right to practice a fraud upon the public in the sale of an article even after it has become the subject of trade in different parts of the country. If a statute does not lay an absolute inhibition on the sale of oleomargarine, but only seeks to promote and enforce fair dealing and suppress deception and false pretenses, by compelling the sale of oleomargarine for what it really is and preventing its sale for what it is not, such statute is within the police power of the state, and is not unconstitutional as an interference with interstate commerce: *Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. Rep. 154.

A statute prohibiting the sale of oleomargarine unless it is colored pink is, in effect, prohibitory, since it imposes a condition that practically prevents all sales. Hence, so far as it applies to oleomargarine imported from other states, it is unconstitutional: *Collins v. New Hampshire*, 171 U. S. 30, 18 Sup. Ct. Rep. 768. But see *State v. Myers*, 42 W. Va. 822, 57 Am. St. Rep. 887, 26 S. E. 539.

Moreover, it has been held that a statute prohibiting the manufacture or sale of oleomargarine, unless it is free from coloring matter or other ingredient which would cause it to look like butter, is invalid as a regulation of interstate commerce: *In re Worthen*, 58 Fed. 467. On the other hand, the supreme court of New Jersey, in *State v. Newton*, 50 N. J. L. 534, 14 Atl. 604, decided that the statute of that state rendering penal the sale of oleomargarine colored with annatto, as applied to a sale in the state by the agent of a manufacturer in Indiana, was valid.

This question of the authority of a state to require that all oleomargarine, including that introduced from other states, be made and sold in its natural state without artificial coloring was suggested in the recent case of *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. Rep. 120, but was not decided. It remains, therefore, an open question.

EMERSON v. SHORES.

[95 Me. 237, 49 Atl. 1051.]

GROWING TIMBER FORMS PART OF THE REALTY and may be separated from the rest by grant or reservation. When so separated, it retains its character so long as it remains uncut; but when severed, it becomes personal property. (p. 405.)

GROWING TIMBER.—PAROL OR SIMPLE CONTRACTS for the sale of growing timber, to be cut and removed by the purchaser, are not regarded as within the statute of frauds. (p. 405.)

TIMBER.—A LICENSE TO ENTER AND CUT TIMBER, created by a parol or simple contract, is irrevocable as to that which has been severed in execution of the contract, but as to that not yet severed from the land it is revocable at the will of the owner, or by his death, or by his conveyance without reservation. (p. 405.)

UNSEALED CONTRACTS.—APART FROM THE STATUTE OF FRAUDS, there is no distinction between unsealed written and oral contracts. Whether written or spoken, they are in law, if not sealed, equally and only parol contracts. (p. 406.)

TIMBER, SALE OF.—A CONVEYANCE OF LAND, without reservation of the trees standing on it, but with notice to the grantee that the grantor had sold the standing growth to another, operates as a revocation of the license to cut the timber, and as a breach of the contract for its sale. (p. 405.)

C. F. Johnson, for the plaintiffs.

S. S. and F. E. Brown, for the defendant.

²³⁷ **WHITEHOUSE, J.** In this action of assumpsit the plaintiffs seek to recover damages for the breach of a contract for the sale of standing wood and timber. January 9, 1897, the defendant was ²³⁸ the owner of the wood lot in question and gave the plaintiffs the following memorandum, signed by her, viz.:

"This is to certify that I have sold the growth on the fifty acre lot, known as the Joseph Hurd lot to Stephen Emerson, Ross Paul, and James Spaulding, for which I give them five years to get the growth off in."

During the winter of 1897, and the two following winters, the plaintiffs, by virtue of this agreement, cut and removed a part of the trees standing on the lot. But in February, 1899, the defendant, without the knowledge or consent of the plaintiffs, conveyed her farm, including this wood lot, by deed of warranty to Charles L. Withee, making no reference in the deed to this agreement with the plaintiffs, and no reservation of the standing trees on the wood lot in question. In May following, Withee

conveyed the same premises to Stephen A. Nye, also, by deed of warranty, without any reservation or exceptions; but Nye made the purchase for Abel Spaulding and gave to Spaulding's wife a bond for a deed upon the payment of three thousand five hundred and thirty-one dollars. Abel Spaulding thereupon entered into possession of the farm. In the fall or early winter of 1899, the plaintiffs entered upon the lot in question for the purpose of cutting and removing the trees then standing, but were forbidden to do so by Abel Spaulding. The evidence also tended to show that when the defendant conveyed the property to Withee she informed him of her contract with the plaintiffs, and that Withee took the deed with the understanding that the plaintiffs were to cut and remove the growth according to the terms of their contract. There was also evidence that information of the plaintiffs' contract was communicated to Nye and Abel Spaulding, and that Nye gave Withee to understand that the plaintiffs would have the benefit of their contract with the defendant. But the case fails to show that either Withee or Nye or Spaulding ever made any agreement with the plaintiffs in regard to their right to cut the standing trees after the defendant's conveyance of the lot. The only contract ever made by the plaintiffs with anyone, authorizing them to cut and remove the standing trees, was that evidenced by the above memorandum signed by the defendant.

²³⁹ The question thus presented for determination is whether the defendant's conveyance of the land by deed of warranty without reservation of the trees standing on the lot, but with an oral notice to her grantee that she had sold the standing growth, operated as a revocation of her license to the plaintiffs to cut off the wood and timber, and as a breach of her contract with the plaintiffs.

It is elementary knowledge that growing timber forms a part of the realty, and, like any other part of the estate, may be separated from the rest by express reservation or grant; and even when so separated it retains its distinctive character as an incident of real property so long as it remains uncut; but when cut and severed from the soil, it becomes personal property, to which title may be acquired, as in case of other chattels, by simple contracts, either oral or written. It has accordingly become settled law under the decisions of this court, and by the great weight of authority elsewhere, that parol or simple contracts for the sale of growing wood or timber, to be cut and removed from the land by the purchaser, are not to be con-

strued as intended by the parties to convey any interest in land, but as executory contracts for the sale of the timber after it shall have been severed from the soil and converted into chattel property, together with a license to enter upon the land for the purpose of cutting and removing it. Hence, an oral agreement for such a purpose is not regarded as within the statute of frauds.

It is equally well settled that while the license to enter and cut timber, thus created by parol or simple contracts, is irrevocable as to that part of the timber which has been severed from the land in execution of the contract, yet while it remains executory, as to the wood or timber not yet severed from the land, it is revocable not only at the will of the owner, but by his death or by his conveyance of the land without reservation: *Buker v. Bowden*, 83 Me. 69, 21 Atl. 748; *Banton v. Shorey*, 77 Me. 48; *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254; *Folsom v. Moore*, 19 Me. 252; *Brown v. Dodge*, 32 Me. 167; *Drake v. Wells*, 11 Allen, 141; *Giles v. Simonds*, 15 Gray, 441, 77 Am. Dec. 373; *Douglas v. Shumway*, 13 Gray, 498; *White v. Foster*, 102 Mass. 375; *Fletcher v. Livingston*, 153 Mass. 388, 26 N. E. 1001; *Cook v. Stearns*, 11 Mass. 533; 13 Am. & Eng. Ency. of Law, 1st ed., 555.

In *Drake v. Wells*, 11 Allen, 141, it was held that if the owner of land, for a valuable consideration, orally licenses another to cut off, within a certain time, the trees standing upon it, and afterward executes an absolute deed of the land to a third person, such deed, when made known to the licensee, will operate as a revocation of the license, although the grantee had knowledge of it. In the opinion the court say: "The whole rests in contract. A revocation of the license to enter on the land does not defeat any valid title; it does not deprive an owner of chattels of his property in or possession of them. The contract being still executory, no title has passed to the vendor, and the refusal of the vendor to permit the vendee to enter on the land, for the purpose of disconnecting from the freehold the property agreed to be sold, is only a breach of contract, the remedy for which is an action for damages."

The distinction sought to be made in behalf of the defendant between an oral agreement for the sale of standing trees, with a license to cut and remove them within a specified time, and an unsealed written agreement for the same purpose, is not in harmony with elementary principles, and is not supported by the citation of any authorities. At common law, apart from the

statute of frauds, there is no distinction between unsealed written and oral contracts. For whether they are written or only spoken, they are in law, if not sealed, equally and only parol contracts. A present legal interest in real property can only be granted in this state by an instrument under seal. In two of the cases above cited the contracts for the sale of the standing trees there in question, as in the case at bar, were evidenced by written bills of sale.

In *Fletcher v. Livingston*, 153 Mass. 388, 26 N. E. 1001, the owner of a tract of woodland agreed in writing, for a valuable consideration, to sell to the plaintiff all the wood and timber standing on it, "with one year's time to get it off," and the court said in the opinion: "It is well settled that a contract, like that relied on by the plaintiff, does not immediately pass a title to property, and is not a sale or a contract for a sale of an interest in land, but an executory agreement ²⁴¹ for the sale of chattels to take effect when the wood and timber are severed from the land, with a license to enter and cut the trees and remove them. Such a contract, if oral, is not within the statute of frauds, and its construction is the same as if it were in writing."

In *Douglass v. Shumway*, 13 Gray, 498, a bill of sale of standing wood and timber was given by the owner of the land, as in the case at bar, with a license to remove it within a specified time, and this written, but unsealed, instrument was construed by the court as having the same force and effect that an oral agreement for the same purpose would have had.

In the case at bar the plaintiffs had no knowledge of the defendant's conveyance of the land until after it was made, and never waived any rights acquired under their parol contract for the standing growth. They were not parties to any private oral arrangements the defendant may have had with her grantee, or his successors in title, in regard to their recognition of the plaintiff's claim. There was no privity of contract between such grantees and the plaintiffs, and where there is no privity of contract, no action will lie. The defendant's conveyance of the land, without any reservation of the standing growth, operated as a revocation of the plaintiff's license to enter for the purpose of cutting and removing the trees, and any such entry by them for that purpose against the express prohibition of the owners of the land would have been a trespass. Whether the defendant has any remedy in law or equity against her grantee for his failure to protect the rights of the plaintiffs by a reserva-

tion in his deed to his successors, in accordance with any oral agreement he may have made with her, is a question not now before the court. The plaintiffs' remedy is an action for damages against the defendant for a breach of her contract with them.

The uncontroverted testimony introduced by the plaintiffs, in relation to damages shows that the value of the growth now standing on the lot exceeds one hundred dollars, the amount named as the *ad damnum* in the writ; but the plaintiffs' recovery must be limited to that amount.

Judgment for the plaintiffs for one hundred dollars.

Standing Timber is an Interest in lands: *Mee v. Benedict*, 99 Mich. 260, 89 Am. St. Rep. 543, 57 N. W. 175. But if the land owner sells it to be removed within a specified time, that which is cut within that time becomes the personal property of the licensee: *Macomber v. Detroit etc. R. R. Co.*, 108 Mich. 491, 62 Am. St. Rep. 713, 66 N. W. 376.

Contracts for the Sale of Growing Timber are contracts for the sale of an interest in land, and must be in writing under the statute of frauds: *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 293; *Slocum v. Seymour*, 36 N. J. L. 138, 13 Am. Rep. 432; *Hirth v. Graham*, 50 Ohio St. 57, 40 Am. St. Rep. 641, 33 N. E. 90; *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 77 Am. St. Rep. 46, 25 South. 709. Some authorities hold, however, that such contracts, especially if they contemplate the immediate removal of the timber, are only a sale of chattels: Note to *Kingsley v. Holbrook*, 86 Am. Dec. 182; *Carpenter v. Medford*, 99 N. C. 495, 6 Am. St. Rep. 535, 6 S. E. 785; *Fish v. Capwell*, 18 R. I. 667, 49 Am. St. Rep. 807, 29 Atl. 840.

A Parol Sale of Growing Timber is Revoked by a conveyance of the land: *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19. See, too, *Fish v. Capwell*, 18 R. I. 667, 49 Am. St. Rep. 807, 29 Atl. 840.

STICKNEY & BABCOCK COAL CO. v. GOODWIN.

[95 Me. 246, 49 Atl. 1039.]

BANKRUPTCY.—AN ATTACHMENT OF REAL ESTATE is not dissolved by proceedings in bankruptcy begun by the defendant more than four months thereafter. (p. 409.)

ATTACHMENT.—IF A CONVEYANCE IS FRAUDULENT and void as to creditors, the title is regarded as remaining in the grantor, and a judgment creditor by levy acquires such seisin as enables him to maintain a real action against the fraudulent grantee. (p. 411.)

C. H. Bartlett, for the plaintiff.

B. C. Addition and D. W. Nason, for the defendant.

²⁴⁷ WISWELL, C. J. On May 16, 1899, the plaintiff commenced suit against the defendant upon a promissory note. In the writ there was a direction to attach the goods and estate of the defendant, and especially to attach two parcels of real estate, particularly described, alleged to belong to the defendant, but to have been conveyed by him, one parcel to his wife and the other to his son, by deeds dated October 31, 1898, in fraud of the plaintiff, a creditor at the time of the conveyances. Upon the same day an attachment was made of all the defendant's real estate and interest in real estate in Penobscot county, and at the same time a special attachment was made, as directed, of the two parcels described in the writ and alleged to have been fraudulently conveyed.

²⁴⁸ The defendant filed his voluntary petition in bankruptcy in the clerk's office of the United States district court in this district on September 23, 1899, and was duly adjudged a bankrupt, and subsequently received his discharge in accordance with the provisions of the bankruptcy act of 1898.

It is, of course, conceded that the cause of action sued was provable against the defendant in bankruptcy, and that consequently the defendant's discharge is a bar to this action against him. But the plaintiff does not seek for a judgment against the defendant. It asks for a special judgment against the property attached, or claimed to have been attached, upon the original writ. We see no reason why the plaintiff is not entitled to such judgment.

By section 67, subdivision f, of the bankruptcy act of 1898, "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt." This section applies to a case where a voluntary petition is filed by the bankrupt, as well as to a case where the petition is filed against him: *Jones v. Stevens*, 94 Me. 582, 48 Atl. 170.

But this attachment was not made within four months prior to the time of the filing of the petition in bankruptcy. It was made several days more than four months prior to the filing of the petition. The language of the act above quoted, to the effect that all attachments made within four months prior to

the filing of the petition in bankruptcy shall be dissolved is equivalent to an express provision for the preservation of attachments made more than that time before the filing of the petition, as decided by this court in considering a similar provision of the bankruptcy act of 1867, in *Leighton v. Kelsey*, 57 Me. 85.

The attachment not being dissolved by the bankruptcy proceedings, ²⁴⁹ if the plaintiff could not have a judgment against the property claimed to have been attached, it would be entirely without remedy, although, as we have seen, the attachment was not dissolved and although the property attached, even if fraudulently conveyed more than four months prior to the filing of the petition, would not pass to the defendant's trustee in bankruptcy.

That, under such circumstances, a plaintiff might have judgment and execution against the property attached was twice decided by this court while the bankruptcy act of 1867 was in force: *Bowman v. Harding*, 56 Me. 559; *Leighton v. Kelsey*, 57 Me. 85. There is nothing in the present act which would cause a different conclusion.

It is argued that the plaintiff should not have judgment against the property claimed to have been attached, it being conceded that the plaintiff obtained by the attachment no lien upon any real estate except the two parcels especially attached, because the record owners of these parcels are not parties to this proceeding, and have had no opportunity to make their defense; and that under the constitution of this state these record owners should have an opportunity to defend, and should have a right to a trial by jury. But it is not necessary that they should be parties to this suit, or should have an opportunity to make any defense before judgment in this suit is ordered, because we cannot, at this time, upon the plaintiff's motion for a judgment against the property, pass upon the question of the alleged fraudulent conveyance, or determine whether the plaintiff has an attachment in fact.

These questions must be subsequently adjudicated in other proceedings, when the record owners will have ample opportunity to contest the claim of the plaintiff that this property was conveyed by the defendant in fraud of his creditors. We do not decide at this time that the property formerly owned by the defendant was conveyed by him in fraud of his creditors—that involves a question of fact to be subsequently decided when all persons interested are parties—but only that the plaintiff has an

attachment, if the real estate was, in fact, the property of the defendant so far as creditors are concerned at the time of the attachment, and that such attachment, ²⁵⁰ if one exists in fact, has not been dissolved by the proceedings in bankruptcy. The judgment, followed by the enforcement of an execution issued thereon, only permits the plaintiff to proceed further and have the question as to the alleged fraudulent conveyances determined later in proper proceedings.

By Revised Statutes, chapter 76, section 14: "A levy may be made on land fraudulently conveyed by a debtor. . . . In such case the tenant in possession shall not be ousted, but the officer shall deliver to the creditor a momentary seisin sufficient to enable him to maintain an action for its recovery in his own name." And by Revised Statutes, chapter 81, section 56, all real estate liable to be thus taken on execution may be attached on mesne process. If a conveyance is fraudulent and void as to creditors, the title is regarded as remaining in the fraudulent grantor, and the judgment creditor by a levy acquires such seisin as enables him to maintain a real action against the fraudulent grantee: *Marston v. Marston*, 54 Me. 476.

Here, the legal title of the property attached was once in the debtor; if the conveyances, or either of them, were fraudulent as to this creditor, the plaintiff has by its attachment acquired a lien which may be perfected by enforcement of the execution issued on this judgment; but before the tenants can be ousted the question must be determined in proper proceedings.

The plaintiff is, therefore, entitled to judgment against the property claimed to have been attached in the original writ. The case is remanded to nisi prius for a determination of the amount for which the plaintiff is entitled to such judgment.

So ordered.

Attachment.—A discharge in bankruptcy will not prevent a creditor from taking a decree in rem against a fund upon which he obtained a lien, by trustee attachment, more than four months prior to the commencement of the proceedings in bankruptcy: *Stoddard v. Locke*, 43 Vt. 574, 5 Am. Rep. 308. See, also, in this connection, *Westbrook Mfg. Co. v. Grant*, 60 Me. 88, 11 Am. Rep. 181; *Fisher v. Vose*, 3 Rob. (La.) 457, 38 Am. Dec. 243; *Rosenthal v. Nove*, 175 Mass. 559, 78 Am. St. Rep. 512, 56 N. E. 884.

Attachment.—Real property fraudulently conveyed by a debtor is subject to attachment: *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359.

MERCHANTS' TRUST AND BANKING CO. v. JONES.

[95 Me. 335, 50 Atl. 48.]

NOTE—INDORSEMENT BEFORE DELIVERY.—One not a party to a note, who signs his name upon the back thereof before its negotiation and before the indorsement of the payee, is, as to the indorsee, an original promisor. (p. 413.)

G. H. Smith and H. T. Powers, for the plaintiff.

L. C. Stearns and E. A. Holmes, for the defendant.

WISWELL, C. J. Action upon a promissory note of the following tenor:

"\$600.00.

Presque Isle, Me., Aug. 9, 1897.

"Four months after date, I promise to pay to the order of the Houghton Hardware Company, six hundred dollars at the Merchants' Trust and Banking Company. Value received.

"E. L. HOUGHTON."

The note was indorsed upon the back, first by the defendant, next by the payee, the Houghton Hardware Company, and last by G. A. Houghton. Over each indorsement were the words: "Waiving demand and notice."

The action is against the defendant as one of the original makers of the above note. The case shows that this note was the second renewal of a note of like tenor, signed by the same parties and in the same order; that at the maturity of the note in this suit, December 9, 1897, the Houghton Hardware Company, for whom the plaintiff had discounted the original note and its renewals, sent to the trust company a new note similar in all respects to the note in suit, except that it did not bear the name thereon of the defendant; this note was dated December 9, 1897, and was on four months' time. Accompanying this note, the treasurer of the hardware company ³³⁷ wrote to the treasurer of the banking company as follows: "Inclosed find renewal note as per inclosed notice. We could not get the other names on the note, as the party was away from home. If you don't want to take it this way, please pin it to the old one and hold both. Check for discount sixteen dollars."

Accordingly, on December 11th, two days after the maturity of the note in suit, the trust company, without the knowledge of the defendant, took the note of December 9th, but did not

surrender the note in suit, holding it as collateral for the last-named note. This last note was renewed from time to time by other notes, without the signature of the defendant, but similar in other respects and with the same names. On May 16, 1899, a note of the same kind was taken, but larger in amount, in renewal of the previous six hundred dollar note and of two other small notes, and this latter note was again renewed, the last one being dated January 16, 1900, on four months' time, and had not become due at the commencement of this suit. The trust company continued to hold the note in suit as collateral for these various renewals.

Under these circumstances, is the defendant liable as one of the makers of the note in suit? That he was one of the original promisors with E. L. Houghton, so far as appeared from the note, is not disputed, notwithstanding that his name was upon the back of the note. He signed the note at its inception, before the same was indorsed by the payee. He was consequently one of the original makers of the note and liable as such: *Woodman v. Boothby*, 66 Me. 389; *Rice v. Cook*, 71 Me. 559; *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461.

"It is the settled doctrine of these states (Maine and Massachusetts) that one not appearing to be a party, either as payee or indorsee, to a note payable to a payee therein named or his order, who puts his name on the back of it in blank at its inception and before negotiated, is a joint and several promisor. The legal presumption, in such case, is that it was done for the same consideration with the contract on the face of the note. And when there is no date as to such indorsement, the presumption is that it was made at the time when the note had its inception. This presumption will ³³⁸ prevail in favor of an innocent indorsee for value before due, and in the regular course of business; and his rights cannot be infringed by proof of any extrinsic facts which might affect the original parties to the contract, or those occupying their position and having their rights only": *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461, and cases there cited. Nor does the use of the words "waiving demand and notice" in the least weaken or affect this presumption: *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461, and cases cited to that point.

But it is urged, in defense, that the defendant was in fact a surety or an accommodation maker. And of this there is no question; he signed the note, in the manner that he did, for the accommodation and at the request of the Houghton

Hardware Company, as he says, and before it was negotiated. Had this fact been known by the plaintiff, we have no doubt that the effect of taking the new note, without the knowledge of the defendant, would have been to release the defendant from liability, as was decided by this court in *Andrews v. Marrett*, 58 Me. 539. But in that case the court said: "That the defendant was a mere surety on the note in suit, and that the plaintiff knew such to be the fact when he took it, is satisfactorily proved."

Here, while as a matter of fact, the defendant signed the note for the accommodation of the hardware company, the trust company had no knowledge of that fact, and there were no circumstances which should have placed the officers of that institution upon their inquiry. Having no knowledge to the contrary, the officers of the plaintiff corporation had a right to rely upon the note itself, and upon the presumptions of law that arose therefrom as to the liability of the various persons whose names appeared upon the note. They had a right to rely upon the settled doctrine of this state, that a person, not a party to the note, who signs his name upon the back of a note before its negotiation and before the indorsement of the payee, is, as to the indorsee, an original promisor.

This note, which the trust company took in good faith, for a valuable consideration, before maturity and without knowledge that the facts and relations of the parties were different from those disclosed by the note itself, has never been paid. True, shortly ³³⁰ after its maturity the other parties to the note gave a new note, but that was not in payment of the old one that the plaintiff held at the request of the hardware company, its customer, because it had not been paid.

The condition of affairs, then, was this: The plaintiff held the note of which the defendant was one of the makers, it was payable to the hardware company, and had been discounted by the plaintiff for that company, the payee. The note was not paid at maturity, and the payee, being unable to obtain the signature of the defendant at that time for the purpose of making a renewal note, requested the trust company to continue to hold the note, which it already had, and which it had taken in the regular course of business, as collateral security for the new note. We think that the plaintiff could do this without thereby releasing the defendant from the liability which he had assumed, as indicated by the note.

The plaintiff is accordingly entitled to judgment for the amount of the note in suit and interest thereon, less the amount of a payment of twenty-five dollars which, it is admitted, should be allowed.

Judgment accordingly.

Note—Indorsement before Delivery.—The majority of the cases hold that one who places his name on a negotiable note before its delivery is a joint maker or surety, and that his liability is different from that of an indorser or guarantor: See the monographic note to *Cadwallader v. Hirshfeld*, 72 Am. St. Rep. 876. Consult, further, *Davis v. Bly*, 164 N. Y. 527, 79 Am. St. Rep. 670, 58 N. E. 648.

LEADER v. PLANTE.

[95 Me. 339, 50 Atl. 54.]

TO CONSTITUTE A NEGOTIABLE PROMISSORY NOTE, THE TIME of payment must be stated with certainty. An instrument payable "within one year after date" fulfills this requirement. (pp. 415, 417.)

H. W. Oakes, J. A. Pulsifer, F. E. Ludden, and E. Foster,
for the plaintiff.

J. A. Morrill, for the defendant.

§40 FOGLER, J. This is an action of assumpsit by the indorsee against the maker of a written instrument, declared upon as a promissory note of the following tenor, namely:

§406. Auburn, Maine, August 30th, 1892.

"Within one year after date I promise to pay to the order of Richard F. Leader Four Hundred and six Dollars at with interest. Value received.

"TELESPHORE PLANTE.

"Witness: P. H. KELLEHER.

"Indorsed: RICHARD F. LEADER."

The writing was indorsed and delivered by the payee to the plaintiff January 2, 1893.

It is claimed in defense that the instrument is not a valid negotiable promissory note, for the reason that the time of payment named therein is not stated with sufficient certainty. In other words, it is contended that "within twelve months" is too uncertain and indefinite as to time of payment to give the

instrument the character of a negotiable promissory note. It is familiar law that to constitute a negotiable promissory note, the time of payment must be stated with certainty. It is also a familiar maxim that that is certain which can be made certain.

"A valid promissory note is not necessarily negotiable. To make it such by the law-merchant it must run to order or bearer, be payable in money for a certain definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency": *Roads v. Webb*, 91 Me. 410, 64 Am. St. Rep. 246, 40 Atl. 128.

It is well settled that a note payable at the death of the maker is a valid negotiable promissory note, as death will inevitably occur, ³⁴¹ and the time of payment can thus be made certain: *Martin v. Stone*, 67 N. H. 367, 29 Atl. 845.

"Within" a certain period, "on or before" a day named, and "at or before" a certain day, are equivalent terms and the rules of construction apply to each alike. As stated by Mr. Justice Strout, in *Roads v. Webb*, 91 Me. 410, 64 Am. St. Rep. 246, 40 Atl. 128, the question whether a note made payable "on or before" a day certain states the time of payment with sufficient certainty to constitute a negotiable note has not been decided in this state.

In *Cota v. Buck*, 7 Met. 588, 41 Am. Dec. 464, a note "to be paid in the course of the season now coming" was held to be negotiable, for the reason that the "season now coming" must come by mere lapse of time.

But in *Hubbard v. Moseley*, 11 Gray, 170, 71 Am. Dec. 698, the court of Massachusetts held that a promissory note payable ninety days after date, containing a stipulation that the note shall be given up to the maker as soon as the amount of it is received by the payee, is not negotiable, thus practically overruling the case of *Cota v. Buck*, 7 Met. 588, 41 Am. Dec. 464.

The late Massachusetts decisions upon this point follow the doctrine of *Hubbard v. Mosely*, 11 Gray, 170, 71 Am. Dec. 698; *Way v. Smith*, 111 Mass. 523; *Stults v. Silva*, 119 Mass. 137.

Mr. Justice Cooley, in *Mattison v. Marks*, 31 Mich. 423, 18 Am. Rep. 197, referring to *Hubbard v. Mosely*, 11 Gray, 170, 71 Am. Dec. 698, remarks: "It is to be regretted, perhaps, that the learned judge who delivered the opinion did not deem it important to present more fully the reasons that led him to his

conclusions, instead of contenting himself with a simple reference to the general doctrine that a promissory note must be payable at a time certain."

In *Jellison v. Hill*, 4 Gray, 316, it was held that a note payable "on demand with interest within six months" was a promise to pay within six months in any event and sooner if demanded.

We think that the great weight of authority and of reason is opposed to the present Massachusetts doctrine.

Mattison v. Marks, 31 Mich. 423, 18 Am. Rep. 197, was a suit upon a written instrument containing a promise to pay a sum certain "on or before" a day named. It was contended in defense that it was not a promise to pay on a day certain, and consequently was not a negotiable promissory ³⁴² note. The court held that the instrument was a negotiable promissory note. Mr. Justice Cooley, in delivering the opinion of the court, says: "The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and no more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings."

It is held in *Curtis v. Horn*, 58 N. H. 504, that a promissory note, payable "on or before the first day of May next," is negotiable. The court say in the opinion: "It is now the common law that where payment is made to depend upon an event that is certain to come, and uncertain only in regard to the time when it will take place, the note or bill is negotiable." The court say further: "The recent Massachusetts cases, cited by the defendant, place the conclusions arrived at upon common-law grounds, yet they fail to state the reasons for overruling *Cota v. Buck*, 7 Met. 588, 41 Am. Dec. 464, and the law as held in other jurisdictions, and we are unable to see any."

The doctrine thus laid down by the courts of Michigan and New Hampshire is fully sustained by numerous authorities, of which we cite *Bates v. Leclare*, 49 Vt. 230; *Ricker v. Sprague Mfg. Co.*, 14 R. I. 402, 51 Am. Rep. 413; *Protection Ins. Co. v. Bill*, 31 Conn. 534-538; *Jordan v. Tate*, 19 Ohio St. 586; *Dorsey v. Wolff*, 142 Ill. 589, 34 Am. St. Rep. 99, 32 N. E. 495; *Chicago Ry. etc. Co. v. Merchants' Bank*, 136 U. S. 268-

285, 10 Sup. Ct. Rep. 999; Ernst v. Stectman, 74 Pa. St. 13, 15 Am. Rep. 542.

Our conclusion is that the instrument here in suit is a valid negotiable promissory note.

The defendant further contends that, even if the note is to be regarded as negotiable, the plaintiff ought not to maintain this action thereon, because, he says, there are unsettled partnership transactions between the maker and payee in the settlement of which the note should be taken into consideration. We cannot so hold. The note has no connection with partnership business. It was given by the maker in his individual capacity to the payee individually and not as a copartner. At the date of the note the ³⁴³ parties to it were not partners. The note came into the hands of an indorsee for value before maturity. Judgment must be for the plaintiff. According to the stipulation of the parties, the case is remanded to the court at nisi prius for assessment of damages by the court, in accordance with this opinion.

So ordered.

A Note is None the Less Negotiable because made payable on or before a named date: Dorsey v. Wolff, 142 Ill. 589, 34 Am. St. Rep. 99, 32 N. E. 495; Merrill v. Hurley, 6 S. Dak. 592, 55 Am. St. Rep. 859, 62 N. W. 958; Hunter v. Clarke, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297; Roads v. Webb, 91 Me. 406, 64 Am. St. Rep. 246, 40 Atl. 128. A contrary rule seems to prevail in Massachusetts: Note to Hubbard v. Mosely, 71 Am. Dec. 699.

LEADER v. PLANTE.

[95 Me. 343, 50 Atl. 53.]

CONVERSION.—A SALE BY ONE PERSON of the goods of another is a conversion. (p. 420.)

CONVERSION.—IF ONE COTENANT OF A CHATTEL SELLS the whole of it as his, his co-owner may maintain trover for his share of the value. (p. 420.)

A SALE OR MORTGAGE BY A PARTNER of his interest in the firm assets passes only his share of what may remain after the payment of the partnership debts and the adjustment of the equities of the partners. The share of the purchaser or mortgagee can be determined or recovered only in a suit in equity. (p. 420.)

H. W. Oakes, J. A. Pulsifer, F. E. Ludden, and E. Foster, for the plaintiff.

J. A. Morrill, for the defendant.

³⁴³ FOGLER, J. This is an action of trover, which comes to this court on report.

August 30, 1892, Richard F. Leader, son of the plaintiff, being then engaged in the soda beer business, and owning the stock and appliances used in that business, conveyed to the defendant by written bill of sale one undivided half part of all the stock, tools, ³⁴⁴ implements, and machinery then used by him in that business. Certain articles enumerated in the bill of sale were sold and conveyed subject to a claim in favor of A. D. Puffer & Sons, amounting to about six hundred dollars.

The defendant paid a portion of the purchase price in money, and on the same day gave to said Leader his note for four hundred and six dollars, payable within one year after date, with interest, and secured said note by a mortgage of the same property conveyed to him by the bill of sale above referred to. The above-named conveyances having been made and delivered, said Leader and the defendant on the same day entered into articles of copartnership, and said business was subsequently carried on by them for a time as copartners. January 2, 1893, Leader indorsed and transferred said note and assigned said mortgage to William Leader, the plaintiff. In November, 1893, the plaintiff foreclosed said mortgage for condition broken. October 17, 1892, Richard F. Leader gave the plaintiff a mortgage of one undivided half part of all the goods, wares, and merchandise hitherto used by the defendant and himself in the soda beer business, subject to the claim of A. D. Puffer & Sons, upon the articles above mentioned, the amount of which was stated to be about two hundred and fifty dollars.

The claim of A. D. Puffer & Sons was never fully paid, and that firm took possession of and sold the articles upon which they had a claim.

The partnership does not seem to have ever been formally dissolved. After the business of the firm had ceased to be operated, and after the foreclosure of the mortgage first named, the defendant sold and delivered some of the goods and chattels, of which one undivided half part was conveyed by Richard F. Leader to the defendant, and mortgaged by the defendant to Richard F. Leader. The plaintiff claims in this suit to recover the value of such chattels, claiming one-half under the foreclosed mortgage of the defendant to Richard F. Leader, and the remaining half under the mortgage of Richard F. Leader to himself.

§45 The defendant claims that the transactions were in relation to partnership property, and that the rights of the parties can be settled only in equity.

The sale to the defendant by Richard F. Leader and the mortgage back were not conveyances of partnership property. Richard F. Leader was the sole owner of the property. He, in his individual capacity, conveyed one-half, undivided, to the defendant in his individual capacity. The defendant conveyed back to Leader in mortgage the same property. No partnership had then been formed. The articles of copartnership recite that Leader had sold to Plante one undivided half of the property used in the business, and that Plante had given Leader a mortgage of the same.

At the time when the bill of sale and mortgage were given no partnership existed between the parties. The mortgage after foreclosure vested in the plaintiff, assignee of the mortgage, an absolute title to the mortgaged property. The fact that the parties to the mortgage entered into partnership and used the mortgaged property in their joint business cannot defeat the plaintiff's title. A sale by one person of the goods of another is a conversion. So if one cotenant of a chattel sells the whole of it as his, his cotenant may maintain trover against him for his share of the value: *Dain v. Cowing*, 22 Me. 349, 39 Am. Dec. 585; *Wheeler v. Wheeler*, 33 Me. 347; *Weld v. Oliver*, 21 Pick. 559; *Wilson v. Reed*, 3 Johns. 175.

We are of the opinion that the plaintiff is entitled to recover in this action the value of one-half of all the property of which one undivided half part was conveyed in mortgage by the defendant to Richard F. Leader, which has been sold or otherwise converted by the defendant.

We do not think that the plaintiff can recover in this action for the one undivided half part of the partnership property mortgaged to him by Richard F. Leader. That was a mortgage by one partner of his interest in the partnership property. The mortgagee in such case takes the interest of the mortgaging partner subject to the liabilities of the firm, and subject to the equitable rights of the other partner. He stands in the place of the mortgagor.

§46 The sale or mortgage by a partner of his interest in the partnership assets passes to the purchaser only his share of what may remain after the payment of the partnership debts and the adjustment of the equities of the partners: *Beecher v. Ste-*

vens, 43 Conn. 587; Tappen v. Blaisdell, 5 N. H. 190; Tarbell v. West, 86 N. Y. 280.

The share of the purchaser or mortgagee cannot be determined or recovered in an action at law, but only in a suit in equity. Judgment for plaintiff.

According to the stipulation of the parties the case is remanded to the court at nisi prius for assessment of damages by the court in accordance with this opinion.

So ordered.

Conversion.—If a cotenant undertakes to sell the property of the cotenancy his act is a conversion of his co-owner's interest: See the monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 817, 818; *Knope v. Nunn*, 151 N. Y. 506, 56 Am. St. Rep. 642, 45 N. E. 940; *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238, 40 Atl. 138. For contrary authorities, see the note to *Bolling v. Kirby*, 24 Am. St. Rep. 818.

The Grantee of a Partner Takes His Grantor's Undivided Share of the surplus of the firm property after the partnership debts and the claims of the copartners are satisfied: *Mumford v. McKay*, 8 Wend. 442, 24 Am. Dec. 84.

STATE v. MEANS.

[95 Me. 364, 50 Atl. 30.]

INSTRUCTIONS.—IT IS NOT AN EXPRESSION OF AN OPINION upon the issues of fact for the presiding justice to state in his charge to the jury that there is no evidence impeaching the character of a witness for virtue or integrity. (p. 423.)

A COURT MAY INSTRUCT THE JURY TO APPLY TO TESTIMONY the tests of consistency and probability, and aid them in arriving at the fact in issue by stating both affirmatively and interrogatively the questions to be considered and determined by them. (p. 423.)

WHERE INSTRUCTIONS BEAR UPON THE ISSUE, the court disclaims any purpose of assuming to determine the facts by stating to the jury in the same connection: "That is for you to judge." These are considerations for you; I express no opinion." (p. 423.)

INSTRUCTIONS.—COMMENTS OF THE COURT which are deductions of truth based upon general experience are not subject to exception. (p. 423.)

INSTRUCTIONS—OPINION OF COURT.—An instruction stating a rule of conduct so uniform among men as to be proverbial is not an expression of the opinion of the court. (p. 423.)

INSTRUCTIONS.—THE COURT, IN ADDITION TO INSTRUCTING the jury upon the law, should aid them by recalling and collating the details of testimony and resolving complicated evidence into its simplest elements. (p. 424.)

Indictment for abortion. There was a verdict of guilty, and the defendants took exception to the charge to the jury.

W. S. Mathews, for the state.

B. F. Hamilton, George F. and Leroy Haley, for the defendants.

³⁶⁵ PEABODY, J. The exceptions are to the instructions of the presiding justice contained in eight paragraphs of his charge to the jury, viz.:

1. I am not aware that any insinuation has been thrown out, certainly no evidence introduced impeaching her character for virtue ³⁶⁶ or integrity, or that she has had any improper relations with anybody excepting with Mr. Means, under such circumstances as that occurred.

2. Mr. Means says that it was understood between him and Mrs. Marcotte that when he went to Stone's office that he would make the admissions for some purpose or other, and that the fact was not so; but in the presence of Mr. Stone he was to make such admissions and did make them. Is that a reasonable explanation? Does a man voluntarily confess himself guilty of a serious crime like this, to please anybody, to a third party, as in this case?

3. It is said that Mrs. Marcotte afterward wanted the warrant destroyed, and there is evidence of that. I don't recollect whether she spoke of it or not. I do not think she denied it. When was that? Was that at a time when the parties had harmonized, and when, as she says, she expected to be married, and after the agreement at Mr. Stone's office, or not? If so, it might be pretty apparent, perhaps, why both parties would like to have any evidence of that sort out of the way, if they could, because there was a little scandal connected with it.

4. If he was the father of the child, which is the most probable, that she would suggest to go there at the time the criminal court sat, or that he would suggest it?

5. He does not explain why it was necessary to deceive Mr. Stone, or why any such transaction, roundabout transaction, was reasonable or proper to be done, but he says that was the way.

6. Now, the question should arise, if that was the arrangement, and if they felt it was desirable to make such a roundabout arrangement as that to give a note and take it up for his mother to sign, and pay money, and then go out on the street

and pay it all back again, whether it was necessary for Mr. Means to take it up and get his mother's signature, or all that formality, and why it was necessary, if that was the fact, to have another note made and stamped? Is that a reasonable and truthful story? You will judge of that.

³⁶⁷ 7. You come to the January term, 1899, and you find Mrs. Marcotte up to Haverhill. Mr. Means seems to know about it, according to his testimony all through; and that visit happens to be, according to the testimony, at a time when the grand jury was in session.

8. Innocent men, men conscious of innocence, do not have much occasion to fear a grand jury; and it is rather unusual, I think you will say in your own experience, that men who are conscious of having committed no offense either to fear an indictment, or to undertake to get out of the jurisdiction when a grand jury is sitting.

It is claimed by the respondents that these instructions are in violation of the statute (Rev. Stats., c. 82, sec. 83) prohibiting the presiding justice during a jury trial, including the charge, from expressing an opinion upon issues of fact arising in the case.

The first exception is to the language of the presiding justice indicating that there is no evidence impeaching the character of Mrs. Marcotte for virtue or integrity; and the complaint is that this language assumes that her character could not be impeached. Cases are cited which sustain the rule that, as she was simply a witness in the case, her character for truth and veracity only could be impeached.

The justice had the right to assume in reference to her character what the law assumed, and his statement was warranted also by the testimony of the respondent Means himself. All that the respondents could require was, that the jury should consider her interest and her feeling as detracting from the credibility of her testimony, and as the instruction on that point was explicit, they were not prejudiced.

We can discover no grounds of exception in the third specification.

The fourth, fifth, and sixth exceptions are to the remarks of the justice in his analysis of the testimony of Means and directing attention to the dubious incidents of his narrative. He could properly instruct the jury to apply to the testimony of witnesses the tests of consistency and probability, and aid them in ³⁶⁸ arriving at the truth—the fact in issue—by stating both

affirmatively and interrogatively the various propositions and incidental questions to be considered and determined by them.

It is possible that an inference unfavorable to the testimony of Means could be drawn from the language used, but it is not an expression of opinion within the provision of the statute: *McLellan v. Wheeler*, 70 Me. 285; *State v. Day*, 79 Me. 120, 8 Atl. 544.

The instructions complained of in the second, seventh, and eighth exceptions, if limited to the words quoted, bear upon the issue between the state and the respondent Means, but the justice disclaimed any purpose of assuming to determine the facts by stating to the jury in the same connection, "That is for you to judge." "These are considerations for you; I express no opinion." No allusion to the admitted confession of Means to Mr. Stone, the subject of the second exception, could be made by the presiding justice without involving a possible inference of his opinion as to the guilt of that respondent. But his comments were deductions of truth based upon general experience.

And the same construction applies to the seventh and eighth paragraphs excepted to, which together constitute one ground of exception. The language complained of is the statement of a rule of conduct so uniform among men as to be proverbial, and was not an expression of the individual opinion of the justice: *McLellan v. Wheeler*, 70 Me. 285; *State v. Richards*, 85 Me. 252, 27 Atl. 122. It would be impossible for the presiding justice to rule or charge the jury upon matters of law independently of the environment of fact.

When the constitution of Maine was adopted, trial by jury was preserved, and is substantially what it was by the common law. The common-law jury trial and our constitutional jury trial imply the presence and participation of the judge and the jury. The questions of law which are to be determined by the court, and the questions of fact which are to be determined by the jury, shade into each other, and the line of separation may sometimes be obscure. The presiding justice, in addition to his duty of instructing the ³⁶⁹ jury upon the law, should aid them by recalling and collating the details of testimony and resolving complicated evidence into its simplest elements. He is empowered to instruct them on the law and to advise them on the facts: *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. Rep. 580; *Nudd v. Burrows*, 91 U. S. 426.

Lord Hale, in his *History of the Common Law*, says relative to trial by jury: "It has the advantage of the judge's observa-

tion, attention, and assistance in point of law by way of deciding, and in point of fact by way of direction to the jury": 2 Hale's History of the Common Law, 5th ed., 147, 156.

Exceptions overruled.

Instructions.—It is proper for a court to collate the facts and state the rule of law applicable: *Medearis v. Anchor Mut. Fire Ins. Co.*, 104 Iowa, 88, 65 Am. St. Rep. 428, 73 N. W. 495.

Instructions—Opinions and Conclusions.—Instructions should avoid any statement of the evidence which may indicate the conclusions of the judge respecting the facts directly disputed on the trial: *McShane v. Kenkle*, 18 Mont. 208, 56 Am. St. Rep. 578, 44 Pac. 979. But he may, and when it seems necessary he should, give his opinion of the nature, bearing and force of the evidence adduced: *State v. Main*, 69 Conn. 123, 61 Am. St. Rep. 30, 37 Atl. 80. See, also, *State v. Jacob*, 30 S. C. 131, 14 Am. St. Rep. 897, 8 S. E. 698. The court's opinion upon the facts may be submitted to the jury, if they are at the same time informed that they are to judge of the facts: *Gordon v. Little*, 8 Serg. & R. 533, 11 Am. Dec. 632. See, also, *Matthews v. Allen*, 16 Gray, 594, 77 Am. Dec. 430; *Porter v. Sellar*, 23 Pa. St. 424, 62 Am. Dec. 841.

DEAN v. CUSHMAN.

[95 Me. 454, 50 Atl. 85.]

IF A MORTGAGOR OF CHATTELS IN POSSESSION SELLS and delivers the property, he is guilty of conversion. (p. 425.)

A BONA FIDE PURCHASER OF A MORTGAGED CHATTEL of the mortgagor in possession obtains a right of possession, except as against the mortgagee, and a right to redeem it. (p. 426.)

A BONA FIDE PURCHASER OF MORTGAGED CHATTELS of the mortgagor in possession, if he merely receives them into his possession and exercises no dominion over them to the exclusion of the mortgagee, or in defiance of his rights, is not liable for a conversion, without demand or refusal. (p. 426.)

F. J. Martin and H. M. Cook, for the plaintiff.

J. A. Peters, Jr., for the defendant.

⁴⁵⁵ **SAVAGE, J.** Trover for the conversion of a small quantity of hay.

⁴⁵⁶ The plaintiff is mortgagee, under a mortgage which provided that the mortgagor might continue in possession of the hay until the conditions of payment were broken. The defendant was a purchaser from the mortgagor before condition broken. At the time of the purchase, the defendant had no

actual knowledge of the existence of the plaintiff's mortgage. The agreed statement shows that the hay, at the time of the sale, was in the possession of one Oakes, the mortgagor, that upon the sale being made, the hay "was then and there placed by Oakes in defendant's barn," and was afterward paid for by the defendant. No demand for the hay was made before the commencement of the action, and no evidence of conversion was offered other than is contained in the foregoing statement of facts. The judge below ruled, as matter of law, that the action was maintainable without proof of demand and refusal, and to this ruling the defendant excepted.

Under the mortgage, the mortgagor had the right of possession. He also had the right to redeem the hay from the mortgage. This right to redeem he could sell; and if he sold that, and only that, he might lawfully deliver possession of the property to the purchaser: *White v. Phelps*, 12 N. H. 382. But if he sold the entire property, the mortgagee's interest as well as his own, such a sale would be unlawful as against the mortgagee, and accompanied by the removal and delivery of the hay by the mortgagor, it would constitute a conversion on his part: *Millar v. Allen*, 10 R. I. 49; *White v. Phelps*, 12 N. H. 382; *Ashmead v. Kellogg*, 23 Conn. 70. Such a sale and consequent conversion would put an end to his right of possession and immediately revest that right in the mortgagee: *Ripley v. Dolbier*, 18 Me. 382; *Grant v. King*, 14 Vt. 367; *Forbes v. Parker*, 16 Pick. 462; *Whitney v. Lowell*, 33 Me. 318.

But although the mortgagor was clearly guilty of a conversion by the sale and removal of the hay, it does not necessarily follow that the purchaser would be likewise guilty. Taking all inferences as strongly as possible against the defendant, it appears that, besides the purchase and payment, the only other act for which the purchaser could in any way be responsible was the delivery ⁴⁵⁷ of the hay into his barn by the mortgagor. It may be inferable that this delivery was made in pursuance of the contract of sale, to which the defendant was a party. But the defendant had not sold, used, or abused the hay. He had resisted no claim of the plaintiff. He had exercised no actual dominion over the hay as against the plaintiff, or in denial of his right. The plaintiff was not in possession; therefore his possession was not interrupted.

There is a class of cases, like *Hotchkiss v. Hunt*, 49 Me. 213, in which it is held that if a bailee of property for a special purpose sell it without right, the owner may maintain trover against

the purchaser without demand. In such case the purchaser has obtained no right whatever. By his purchase he has bought nothing, he has gained no title whatever, and no right of possession. He cannot compel the owner to part with his right to possession. He is a stranger. Under such circumstances, the sale itself, in which the purchaser participated, was evidence of a conversion. So, in *Freeman v. Underwood*, 66 Me. 229, the vendor was a trespasser. He could convey no interest in the property, and the purchaser received none.

It should be borne in mind, however, that a purchaser from a mortgagor, in a case like the one at bar, really does obtain something. This defendant by his purchase did obtain a right of property in the hay, a right to redeem it, and this notwithstanding the mortgagor exceeded his power in attempting to sell it. The defendant, by the purchase, obtained the right of possession even, against all the world except the mortgagee. Although without the right to retain possession as against the mortgagee, he has the right to pay or tender the mortgage debt, whether the mortgagee wills or not, and thereby divest the mortgagee of any right to possession. He does not stand like a naked stranger.

We hold that one who purchases in good faith, without actual notice, mortgaged chattels of the mortgagor in possession, if he has merely received the goods into his own possession, and has exercised no other dominion or control over them to the exclusion of the mortgagee or in defiance of his rights, is not liable for a conversion, without demand or refusal: 2 *Greenleaf on Evidence*, sec. 642; *Gilmore* ⁴⁵⁸ v. *Newton*, 9 Allen, 171, 85 Am. Dec. 749; *Ware v. Congregational Soc.*, 125 Mass. 584; *Fifield v. Maine Cent. R. R. Co.*, 62 Me. 77. See, also, *Parker v. Middlebrook*, 24 Conn. 207.

Exceptions sustained.

A Sale by a Mortgagor in Exclusion of the mortgagee's right is a conversion: Note to *Hale v. Ames*, 15 Am. Dec. 153. Any sale, seizure, or retention of possession in defiance of a mortgagee's rights, whether by the mortgagor or any other person, is a conversion: See the monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 816.

Where Property is Wrongfully Sold, the Purchaser is guilty of conversion, if he refuses to return it on the demand of the owner: Note to *Hale v. Ames*, 15 Am. Dec. 153. And it has often been held that trover may be maintained against him though he is a bona fide purchaser. There is authority, however, to the contrary: See the monographic note to *Bollings v. Kirby*, 24 Am. St. Rep. 797, 798.

FISHER v. MERCHANTS' INSURANCE COMPANY.

[95 Me. 486, 50 Atl. 282.]

ARBITRATION NOT A CONDITION PRECEDENT.—Unless a provision for arbitration expressly stipulates that until arbitration no action shall be brought, its performance is not precedent to the right to sue on the contract. (p. 429.)

ARBITRATION A CONDITION PRECEDENT.—When a contract provides that no action upon it shall be maintained until arbitration and award, the award is a condition precedent to the right of action. (p. 430.)

INSURANCE.—IF ARBITRATION OF THE AMOUNT OF LOSS is made a condition precedent to a right of action on a fire insurance policy, and the award made is repudiated by the insured as invalid, but without fault of the insurer, the insured cannot, without showing a new reference or an excuse therefor, maintain an action to recover damages irrespective of the amount of the award. (pp. 430, 432.)

E. Foster and R. W. Crockett, for the plaintiff.

W. H. White and S. M. Carter, for the defendant.

487 WISWELL, C. J. Action upon a policy of fire insurance which contained this provision: "In case of loss under this policy and the failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third to be selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a like capacity within four months."

The property covered by the insurance policy having been **488** destroyed by fire, the plaintiff and the various insurance companies that had policies covering the risk, including the defendant company, selected arbitrators in the manner provided in the arbitration clause above quoted. These arbitrators fixed a time and a place for a hearing, gave notice to the parties, heard them together with their counsel and witnesses, and made an award in writing fixing the amount of damage sustained by the insured

by reason of the destruction by fire of the property covered by the policies.

Subsequently this action was commenced. The original declaration contained no reference to the arbitration clause or to the award of the arbitrators. But before the trial it was amended by the insertion of averments setting out this clause, the fact that arbitrators had been chosen, that they had a hearing and made an award, and that this award was invalid and void by reason of the misconduct of the referees during and prior to the hearing before them, for the reasons specifically set out in the amendment. The declaration as amended contained no averment to the effect that the alleged failure of the arbitration was through any fault upon the part of the defendant.

The plaintiff sought to recover damages irrespective of the amount ascertained and awarded by the arbitrators. The defendant requested the following instruction: "The stipulation for arbitration contained in the policy sued on in this case being a condition precedent to the maintenance of an action thereon, if the jury shall find that the arbitration undertaken by the parties in this case failed without fault or misconduct of the defendant company, it would then be the duty of the assured to take steps to procure a new reference in order to comply with the requirements of said condition, and in absence of proof that the assured did all in his power to secure such complete performance of said condition precedent, this action is not maintainable."

This instruction the presiding justice declined to give, and the case proceeded to the jury upon the issues as to whether the award of the arbitrators was invalid by reason of their alleged misconduct, and, if so, as to the amount of damages sustained by the plaintiff. The trial resulted in a verdict for the plaintiff for an amount in ⁴⁸⁹ excess of the defendant's proportional part of the amount awarded by the arbitrators.

While it has long been settled in this country and in England that a stipulation in a contract providing for the settlement by arbitration of all controversies and disputes that might subsequently arise between the parties is invalid, because its effect would be to oust the courts of their jurisdiction, it is equally well settled that if the arbitration agreement relates only to the determination of some preliminary matter, such as the amount of damages to be recovered, and does not apply to the whole question of liability, such provision, when a reasonable and definite method is provided for choosing the arbitrators, is valid and en-

forceable. The leading case wherein this distinction was established is *Scott v. Avery*, 5 H. L. Cas. 811. In our own state in *Stephenson v. Piscataqua etc. Ins. Co.*, 54 Me. 55, the distinction between a valid and invalid arbitration agreement in a contract is thus stated: "While parties may impose, as a condition precedent to application to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law." This doctrine has become so universally recognized by the courts that it is unnecessary to refer to further authorities in its support.

A provision in a contract for the determination by arbitration of such preliminary matters about which there may arise a difference or dispute between the parties, may make such determination a condition precedent to the maintenance of an action upon the contract, or it may be simply a collateral and independent agreement which will not prevent the maintenance of a suit upon the principal contract, but which would be the basis of a separate action in case of its breach. This depends upon the construction of the arbitration provision. The general principle is, as decided in *Roper v. Lendon*, 1 El. & E. 825, that such a condition in a contract to refer any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract; but unless the condition expressly stipulates that until arbitration had no action shall be brought, its performance is not precedent to the right to sue on the contract: See, also, *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. Rep. 133. And it is settled beyond controversy that when the contract provides that no action upon it shall be maintained until after such an award, then the award is a condition precedent to the right of action: *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. Rep. 133; *Hamilton v. Liverpool Globe Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. Rep. 945; *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Reed v. Washington Fire etc. Ins. Co.*, 138 Mass. 572; *Hutchinson v. Liverpool etc. Ins. Co.*, 153 Mass. 143, 26 N. E. 439; *Smith v. California Ins. Co.*, 87 Me. 190, 32 Atl. 872. Many other cases to the same effect might be cited.

In the contract here involved the parties have stipulated in the plainest possible terms, that "such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

The parties, then, having made a perfectly valid agreement that in case of loss no action upon the policy should be main-

tained until the amount of the loss had been first determined in the manner provided, the question arises whether an attempted performance of the condition, which has failed without the fault of the defendant, is such a compliance as will satisfy the condition of the contract and allow the plaintiff to maintain this action to recover, not the amount determined upon by the arbitrators, but damages irrespective of their award. We think that it is not, either upon reason or authority.

If the arbitration had failed by reason of the defendant's fault, the result, upon principles of natural justice, would be different. Under such a clause in a policy of insurance it is the duty of the parties to the contract to act in good faith, and if either act in bad faith, so as to defeat the real object of the clause, the other is absolved from compliance therewith, and is not bound to enter into a new arbitration agreement: *Uhrig v. Williamsburg City Fire Ins. Co.*, 101 N. Y. 362, 4 N. E. 745; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 29 N. E. 844.

But that is not this case as presented by the exceptions. Here, ⁴⁹¹ there is no allegation that the arbitration failed by reason of the defendant's fault, nor any averment that the performance of the condition was impossible. And the request for an instruction, to the effect that the action could not be maintained until performance of the condition precedent, was based upon the contingency that the jury find "that the arbitration undertaken by the parties in this case failed without fault or misconduct of the defendant company."

A determination by arbitration of the amount of loss having been especially made by the parties a condition precedent to any right of action for recovery of damages for the loss, it was incumbent upon the plaintiff to prove performance or a valid excuse for nonperformance. An ineffectual attempt to perform is not a compliance with such a condition in a contract, when no reason is shown why there should not have been full performance. If the award of the arbitrators was invalid, as claimed by the plaintiff, for the reasons set out in the amended declaration, it was the duty of the plaintiff to seek a new determination of the amount of his loss in the manner provided by the contract. The action in such a case is upon the policy, but the damages recoverable are such as have been previously ascertained and determined by the arbitrators, unless the plaintiff shows some sufficient reason why such a determination could not have been obtained. Consequently, there can be no action until performance of the condition or excuse shown for nonperformance. And it is not

sufficient to show an award which the plaintiff repudiates and is not willing to be bound by.

This result, which seems to be the only logical one possible, is in accordance with the authorities. The precise question was decided in *Levine v. Lancaster Ins. Co.*, 66 Minn. 138, 68 N. W. 855, wherein it is said by the court: "The law also undoubtedly is, that under such a provision, if an award be set aside for misconduct of the arbitrators, not participated in or caused by the insurer, the agreement for an appraisement still remains in force, and a new appraisement, unless it had become impossible, would still be a condition precedent to a right of action on the policy, unless waived."

⁴⁹² The same question was decided in the recent case of *Westenhaver v. German-American Ins. Co.* (Iowa, Dec. 1900), 84 N. W. 717, in which it was said: "Ascertainment of the amount of loss by appraisement was a condition precedent to a right of action, and if the appraisers selected failed to agree upon a third, this does not in itself justify a suit for the amount of the loss. In the absence of bad faith or acts intended to defeat arbitration on the part of the insurer, the plaintiff must propose the selection of other arbitrators, to the end that an award may be agreed upon and the basis for action determined." To the same effect are *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, 13 Pac. 863; *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Thorndike v. Wells Memorial Assn.*, 146 Mass. 619, 16 N. E. 747; *Davenport v. Long Island Ins. Co.*, 10 Daly, 535.

The requested instruction should consequently have been given. The action can only be maintained to recover the amount determined upon by the arbitrators, or, if their determination and award were invalid, then the plaintiff must allege and prove either that the amount of the plaintiff's loss has been determined by other arbitrators chosen in the manner stipulated by the parties, or some sufficient reason why such a determination has become unnecessary or impossible. This result makes it unnecessary to consider the defendant's motion for a new trial.

Exceptions sustained.

Arbitration.—The effect of agreements to submit to arbitration is considered in the note to *Commercial Union Assur. Co. v. Hocking*, 2 Am. St. Rep. 566-572.

Insurance.—Arbitration of the amount of loss may be made a condition precedent to the right to recover on an insurance policy: *Niagara etc. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 106, 39 N. E. 1102. But a mere provision for arbitration does not

make it a condition precedent to recovery: *Read v. State Ins. Co.*, 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059. Such a provision cannot deprive the insured of his right of action, unless clearly made a condition precedent to the existence of such right: *Grand Rapids Fire Ins. Co. v. Finn*, 60 Ohio St. 513, 71 Am. St. Rep. 736, 54 N. E. 545; *Birmingham Fire Ins. Co. v. Pulver*, 128 Ill. 329, 9 Am. St. Rep. 598, 18 N. E. 804.

SALLEY v. TERRILL.

[95 Me. 553, 50 Atl. 896.]

A NEGOTIABLE SECURITY, STOLEN FROM THE MAKER before it has become effective by delivery, cannot be enforced by any subsequent innocent holder. (p. 435.)

M. Laughlin, for the plaintiff.

W. H. Powell, for the defendant.

554 **STROUT, J.** This is an action to recover the contents of an order drawn by Charles E. Hurd upon defendant, payable to the order of Harry Carter and by him indorsed to plaintiff. Plaintiff presented it to defendant for acceptance, which was refused. Defendant was engaged in a lumbering operation, and Hurd was in his employ. Among his duties was that of keeping the time of the men, and when one was discharged to draw an order on defendant for the amount due. Blank orders were furnished by defendant to Hurd for this purpose.

Plaintiff claims to hold defendant upon the ground that as Hurd was the agent of defendant, authorized to draw orders of this kind, his signature was in law and effect the signature of defendant, and thus being an order upon himself, it operated as an accepted order, or as a promissory note. That such would be its legal effect is conceded by counsel: *Hancock Bank v. Joy*, 41 Me. 568; Rev. Stats., c. 1, sec. 6, par. 21.

Hurd testified, and his testimony is uncontradicted, that "he wrote the order simply as a matter of practice"; that he left it on his table at the camp "among some papers and other stuff"; that he was called away a few moments, and on his return he "took all the papers and everything and burnt them up," and supposed the order was thus burned, . . . but later, remembering the order, he asked Carter, who had been near when the order was writ-

ten, if he had seen it while he was absent, and he said he had not; that the order did not represent the amount due Carter, and was not delivered nor intended to be delivered to Carter by Hurd, or by his authority. The inference is plain that the possession of the order by Carter was obtained wrongfully and by theft.

The order was drawn and dated November 14, 1898, and was purchased by plaintiff December 17, 1898. Ordinarily, such lapse ⁵⁵⁵ of time before presentation of a demand order would be sufficient to show that it was dishonored when plaintiff received it, but as it purported to be given to an operative in the forest, who might not be able to present it earlier, if there was evidence upon the point, the delay might not be regarded as unreasonable.

Waiving this point, the question recurs, whether a negotiable paper, drawn and signed, but not delivered nor intended to be delivered to the payee, the possession of which is obtained by the payee, by theft, can create a liability of the maker or drawer to a bona fide holder for value, without notice. It is familiar law that one in possession of chattels by theft can convey no title to an innocent purchaser, but coin and bank bills are excepted from the rule. As to those, even if feloniously obtained, the holder can convey a good title to an innocent purchaser.

To favor commerce, the law makes an exception also as to negotiable paper, and permits the bona fide indorsee without notice to acquire title from a person who had none in himself. Where by fraud and without negligence one is induced to sign a promissory note, under the representation and belief that it is a paper of another character, and delivers it to the payee, the innocent indorsee before maturity may recover of the maker. From the many cases supporting this doctrine that might be cited, we refer only to *Nutter v. Stover*, 48 Me. 166; *Kellogg v. Curtis*, 65 Me. 59. So when the maker of negotiable paper deposits it with a third, to be delivered on a certain contingency, or for a specific purpose not apparent upon the paper, and such third party violates the trust and wrongfully makes delivery, the bona fide indorsee before maturity and without notice may recover from the maker. But in all these cases the instrument was either delivered to the payee by the maker or by his agent, and came into his possession as a complete and executed contract.

In the case before us, where the order had never been delivered, and, therefore, had no legal inception or existence as an order, the question is whether there is any liability upon it to an innocent indorsee for value. As is said in *Burson v. Huntington*, 21 Mich.

415, 4 Am. Rep. 497, "the wrongful act of a thief or a trespasser may deprive the ⁵⁵⁶ holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of a maker before delivery is not property, nor the subject of ownership, as such. It is in law but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the part of the maker against his will, where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that in justness and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note." In that case the parties had partially agreed upon the sale by the payee of the note to the maker, of certain territory under a patent right, for which a note was to be given with a surety. The note was made and signed in the maker's house, in presence of his sister. It was laid upon the table, the maker telling the payee not to touch it till he came back, and while he was gone the payee took the note, against the objection of the sister, and went off with it, without giving a deed to the territory or anything else for it, and negotiated it to plaintiff before maturity for value. It was held that plaintiff could not recover. In *District of Columbia v. Cornell*, 130 U. S. 655, 9 Sup. Ct. Rep. 694, negotiable certificates, issued by the board of public works of the district, had been redeemed and canceled by the proper officer, by stamping in ink across the face words stating such cancellation. They were afterward stolen by a clerk, who had no duty or authority connected with their redemption or care, the marks of cancellation effaced by deterative soap and by pasting coupons over them, and then put in circulation. They were held invalid in the hands of an innocent holder. To the same effect are *Cline v. Guthrie*, 42 Ind. 227, 13 Am. Rep. 357; *Hall v. Wilson*, 16 Barb. 548; *Branch v. Commissioners of Sinking Fund*, 80 Va. 427, 56 Am. Rep. 596; *Baxendale v. Bennett*, L. R. 3 Q. B. 525. In the last case it is said that where the maker or acceptor has been held liable, "he has voluntarily parted with the instrument, it has not been got from him by the commission of a crime. This undoubtedly is a distinction and a real distinction. The defendant here ⁵⁵⁷ has not voluntarily put into anyone's hands the means or part of the means for committing a crime." That there must be delivery of the paper, either

actually or constructively, is clear. Until then it has no existence as a contract: *First Nat. Bank v. Strang*, 72 Ill. 559.

Cases may be found apparently sustaining an opposite view, but an examination of them will show that peculiar facts existed on which the decisions were based, and which do not appear here. Of such is *Worcester County Bank v. Dorchester etc. Bank*, 10 Cush. 490, 57 Am. Dec. 120. There a bank bill, intended for circulation as money, and in a complete state of preparation for issue, had been stolen from the bank, and the innocent holder was allowed to recover. But in the opinion it is suggested, though not decided, that a bank bill is not governed by the same rule as ordinary negotiable securities. *Cooke v. United States*, 91 U. S. 389, cited as an opposing authority, rests upon peculiar facts, unlike those presented here. Of this case, however, that court in a later case (*District of Columbia v. Cornell*, 130 U. S. 655, 9 Sup. Ct. Rep. 694), said: "We are not prepared to extend the scope of that decision."

We think that the weight of authority and the sounder reason is that a negotiable security stolen from the maker, before it has become effective as an obligation by actual or constructive delivery, cannot be enforced by any subsequent innocent holder.

It is urged that the case falls within the principle that when one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it. This maxim is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose act has occasioned the loss, or in some other intermediate person whose act or negligence has enabled such third person to occasion the loss. It applies where the drawer or maker has intrusted the paper to a third person to be delivered in a certain event, not apparent on the paper, and it is wrongfully delivered, or is sent by mail and gets into wrong hands; as the party intended to deliver to some one, and selected his own mode of conveyance, or when the maker has himself been deceived by fraudulent acts or ⁵⁵⁸ representations of the payee or others, and thereby induced to deliver or part with the note or indorsement, and the same is fraudulently obtained from him. And there may be such gross carelessness or recklessness of the maker in allowing an undelivered note to get into circulation as will justly estop him from setting up nondelivery, as if he were knowingly to throw it into the street,

or otherwise leave it accessible to the public, with no person present to guard against its abstraction under circumstances where he might reasonably apprehend that it would be taken. Upon this principle *Ingham v. Primrose*, 7 Com. B., N. S., 82, was decided, where the acceptor tore the bill into halves (with the intention of canceling it), and threw it into the street, and the drawer picked them up in his presence, and afterward pasted the two pieces together and put them into circulation.

The case before us does not show negligence of this character. The order was drawn at the table of Hurd, and momentarily left there with other papers of his, to which no one had right of access, and from whence it could only be abstracted by a criminal act, which he could not reasonably anticipate.

Judgment for defendant.

Negotiable Instruments Never Delivered, but obtained and put in circulation without the knowledge of the maker, are generally considered unenforceable by bona fide holders: See the monographic notes to *Bedell v. Herring*, 11 Am. St. Rep. 818-817; *Willard v. Nelson*, 37 Am. St. Rep. 458-460.

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CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

NATIONAL CITIZENS' BANK v. ERTZ

[88 Minn. 12, 85 N. W. 821.]

SALE BY MORTGAGOR—WARRANTY.—If a mortgagor, in pursuance of an agreement with the mortgagee, sells mortgaged chattels, his representations and warranties as to their condition bind the mortgagee. (p. 439.)

BILLS AND NOTES—BONA FIDE HOLDER.—IF A MORTGAGOR, in pursuance of an agreement with the mortgagee, sells mortgaged chattels, and the check received is delivered to the mortgagee in part payment of the mortgage debt, the latter is not a bona fide holder without notice of existing equities. (pp. 438, 439.)

Action to recover interest on a check. Judgment for plaintiff, and the defendant moved for a new trial, and appealed from the order denying it.

Brady & Robertson, for the appellant.

Everett & Moon, for the respondent.

13 COLLINS, J. One Cassiday, doing business in Mankato, Minnesota, as the Cassiday Packing Company, was indebted to plaintiff in the month of December, 1894, in the sum of nine thousand five hundred dollars. On account of this indebtedness, Cassiday indorsed and guaranteed the promissory note of one Johnson, payable to himself, for the same amount, and delivered it to the plaintiff. He also executed a bill of sale or chattel mortgage upon certain meats in his possession to secure the payment of this note, and it was agreed between him and the plaintiff that he should have the right to sell the property thus mortgaged, and pay over to the plaintiff the

moneys received from such sales, the amounts thereof to be applied upon Johnson's note. A part of the mortgaged meats were thereafter shipped to St. Paul and sold to defendant, upon the representations and warranty of Cassiday's salesman that the same were of good quality and in good condition. The defendant gave his check for the amount agreed on, inspected the meats at the first opportunity, and found the same spoiled and worthless. He thereupon returned the articles to Cassiday, and was advised that the check had been sent to Mankato, but that it would be returned to him without delay. Cassiday thereupon again sold the meats, and appropriated the proceeds to his own use. The bank upon which the check was drawn refused payment, and the plaintiff, to whom the check had been delivered in part payment of the Johnson note, brought this suit to recover the amount. Judgment was ordered against defendant, and the appeal is from an order denying the motion for a new trial.

It was found by the court below that Cassiday sold and transferred the check to plaintiff for a good and valuable consideration, and that the plaintiff was a purchaser of the same for value. The real question is whether the representations and warranty made in behalf of Cassiday can be ascribed to plaintiff, and thus render the check subject to the equities which actually existed between Cassiday and defendant. The sale was made in pursuance of an ¹⁴ agreement between Cassiday, mortgagor, and plaintiff, mortgagee, that the mortgaged property might be sold and the proceeds turned over to the latter. The sale and application of the proceeds as agreed upon were perfectly proper, if the parties saw fit to make such an agreement. Its legal effect was to substitute the mortgagor, Cassiday, as the agent of the mortgagee, to do exactly what the latter had a right to do—that is, to sell the mortgaged property, and thus devote it to the payment of the mortgage debt. It was really a sale by the mortgagee, and legally was precisely as if the mortgagee had taken possession and placed a third person in charge as agent, to sell the property and account for the proceeds: *Conkling v. Shelley*, 28 N. Y. 360, 363, 84 Am. Dec. 348; *Brackett v. Harvey*, 91 N. Y. 214, 221; *Dayton v. Peoples*, 23 Kan. 421.

It follows that the representations and warranty made by Cassiday's salesman as to the good quality and condition of the meats were binding upon the plaintiff mortgagee, whose agent

he was, as fully as if it had itself made the sale, with the same representations and warranty. Under the circumstances, the plaintiff was not, and could not have been, a bona fide holder of the check, for value, without notice of the existing equities. Its effort to collect the amount in question is simply an attempt to adopt a part of the acts of its agent (the sale at a stipulated price), and to repudiate the balance (the representations and warranty as to quality and condition).

Order reversed and a new trial granted.

If a Mortgage Gives the Mortgagor Power to Sell the mortgaged chattels, he is regarded, in making a sale, as the agent of the mortgagee: Note to Peabody v. Landon, 15 Am. St. Rep. 916.

CHRISTIANSON v. NORTHWESTERN COMPO-BOARD COMPANY.

[83 Minn. 25, 85 N. W. 826.]

MASTER AND SERVANT—DANGEROUS MACHINERY—INJURY TO EMPLOYEE.—If one charged by statute with the duty of guarding dangerous machinery omits to do so, he is liable to an employee injured thereby, although he could not have reasonably anticipated injury in the precise way it occurred. (p. 441.)

MASTER AND SERVANT.—IF CONTRIBUTORY NEGLIGENCE IS AN OPEN QUESTION as to which reasonable men may differ, it is a question of fact, and the finding of the jury thereon cannot be disturbed. (p. 442.)

MASTER AND SERVANT.—TO CHARGE AN EMPLOYEE WITH THE ASSUMPTION OF RISKS incident to dangerous machinery, it is not sufficient that he knew its condition, unless he also knew or should have known, the risks to which it exposed him in doing the acts he was doing when injured. (p. 442.)

Morton Barrows, for the appellant.

E. F. Hilton, for the respondent.

²⁵ **START, C. J.** Thomas Christianson, a minor of the age of nineteen years, for whose benefit this action is brought, and who will be designated hereafter as the plaintiff, was, on April 2, 1900, injured by coming in contact with a revolving circular saw in the defendant's factory. ²⁶ This action was brought to recover damages for such injuries on the ground of the defendant's negligence. The trial thereof resulted in a verdict

for the plaintiff for four thousand dollars. Thereupon the defendant made a motion for judgment, notwithstanding the verdict, or for a new trial. The trial court made its order denying the motion for judgment, but granting a new trial, unless the plaintiff consented to a reduction of the verdict to two thousand five hundred dollars. The defendant appealed from the order, and its contention here is that the evidence fails to establish any negligence on its part causing the injury complained of, but that it does conclusively appear therefrom that the plaintiff was guilty of contributory negligence, and that he assumed the risk of injury by the saw.

There is no substantial conflict in the evidence, and it tends to establish these facts: The defendant makes in its factory at Minneapolis a composite board, the center of which is made of slats glued together. The slats are packed in bundles and trays, and sent to the slat-room to be cut in equal lengths. For this purpose there are two saws in the room—a large circular saw, known as the “bundle-saw”; and six feet therefrom a smaller one, known as the “tray-saw.” Between the two there is a waste-box, thirty inches high, and some twenty-two and a half inches from its front side to the smaller saw, known as the “hog,” which is for the purpose of receiving the waste from both saws. The plaintiff was employed to operate the larger saw, and had been so employed for three days when he was injured. At that time, in the line of his duty, he gathered up some waste in his hands, and stepped around in front of the hog, and was in the act of throwing the waste into it, when he lost his balance, fell forward, striking his left arm against the smaller, or tray, saw, which was then practically unguarded, whereby he received serious personal injuries.

The plaintiff then knew the location of the tray-saw, and that it was thus unguarded, as he had previously operated it for some three hours in the aggregate. It would have been practicable for the defendant to have so guarded the saw as to have prevented the accident. Other than this there was no defect in the machinery or the room, or any of the appliances therein. The evidence also tended to show some other minor facts; among others, ²⁷ that another employé, a few days before the plaintiff was hurt, was injured while putting waste into the box by his elbow being hit by a passing employé, whereby his hand was forced against the tray-saw and his fingers cut.

1. The first question to be determined is whether these facts reasonably justify the inference that the defendant was guilty of negligence in not guarding the saw, as required by the statute, which, so far as here material, provides that: "All saws in any factory, mill, or workshop shall be so located as not to be dangerous to workmen, or shall be, as far as practicable, properly guarded, fenced, or otherwise protected": Gen. Stats. 1894, sec. 2248.

The purpose of this statute is obvious. It was intended to protect from personal injury the workmen or employes in any shop, mill, or factory by reason of dangerous machinery therein, and it must be so construed as to give effect to such wise and humane purpose: *Tvedt v. Wheeler*, 70 Minn. 161, 167, 72 N. W. 1062. Therefore the statute must be and is construed as requiring that such machinery must be so guarded, if practicable, as to protect such workmen, whether actually operating the machinery or engaged in the discharge of any of their duties in the factory, mill, or shop where it is located, from liability to injury by it. If the person charged with the duty of guarding such machinery omits to do so, he is chargeable with negligence, and liable to any workman or employé injured thereby, although he could not have reasonably anticipated injury in the precise way it actually occurred: *Christianson v. Chicago etc. Ry. Co.*, 67 Minn. 94, 69 N. W. 640; *Keegan v. Minneapolis etc. R. Co.*, 76 Minn. 90, 78 N. W. 965; 14 *Harvard Law Review*, 377.

The evidence is amply sufficient to bring this case within the statute as we have construed it, and to establish negligence on the part of the defendant causing the injury complained of. It tends strongly to show that the defendant neglected its statutory duty to guard the saw, that it was practicable to do so, and that such neglect was the proximate cause of the plaintiff's injury.

2. The next question is, whether the evidence conclusively shows that the plaintiff was guilty of negligence contributing to his injury. ²⁸ It does not appear very clearly from the evidence why the plaintiff lost his balance, resulting in his hand coming in contact with the saw. His testimony on this point was as follows: "I think I slipped in doing so, throwing the waste down into the hog, and lost my balance just enough so as to lean over onto the saw and get hurt." This leaves the question of his contributory negligence an open one, as to which reasonable men certainly might differ. Hence it was

a question of fact, and the finding of the jury thereon in favor of the plaintiff cannot be disturbed.

3. The last question to be considered is whether, upon the evidence, it must be held as a matter of law that the plaintiff assumed the hazards incident to the unguarded saw. He knew that it was unguarded, and, if he had been injured while operating it, it would be a serious question whether he had not assumed the risks of using the saw in its then condition. But such is not this case, for he was not operating the saw which injured him, but the bundle-saw; and he was injured while in the discharge of his duties connected with the operation of the latter. Now, to charge him with the assumption of any risks incident to the condition of the saw which injured him, it is not sufficient that he knew its condition, unless he also knew, or in the exercise of ordinary prudence ought to have known and appreciated, the risks to which the condition of the saw exposed him in doing the acts he was doing when injured: *Wuotilla v. Duluth L. Co.*, 37 Minn. 153, 5 Am. St. Rep. 832, 33 N. W. 551. The evidence is far from conclusive that the plaintiff did so know and appreciate the risk of injury from the unguarded saw in doing the acts which he was doing when injured. This question, as well as the others we have considered, was one of fact, and they were all fairly and clearly submitted to the jury, and the verdict thereon cannot be disturbed.

Order affirmed.

The Rule as to the Assumption of Risks by a servant is, that the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery adequately safe for his use: *Konold v. Rio Grande etc. Ry. Co.*, 21 Utah, 379, 81 Am. St. Rep. 693, 60 Pac. 1021. The fact that a servant knows the defective condition of an instrument with which he works does not necessarily charge him with the assumption of risks growing out of the condition. The question is, Did he know, or ought he to have known, the risks to which the instrument exposed him? *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 5 Am. St. Rep. 832, 33 N. W. 551. See, further, the monographic notes to *Chicago etc. R. R. Co. v. Swett*, 92 Am. Dec. 214-217; *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 222-225.

The Duty of a Master to Furnish Safe Tools and appliances for the use of his servants is considered in the monographic notes to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 218-225; *Chicago etc. R. R. Co. v. Swett*, 92 Am. Dec. 213-221. On the statutory liability of a master for failure to provide safe premises and appliances, see *Odin Coal Co. v. Denman*, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; monographic note to *Gilson v. Delaware etc. Canal Co.*, 86 Am. St. Rep. 817.

NORTHERN CATTLE COMPANY v. MUNRO.

[83 Minn. 87, 85 N. W. 919.]

MORTGAGE FORECLOSURE—PROCEEDS—ASSIGNEE'S RIGHTS.—A SHERIFF who makes a foreclosure sale under a real estate mortgage, and pays the proceeds to the mortgagee, without notice that one of the mortgage notes has been sold to a third party, is not liable to such party for the amount of the note. (p. 445.)

IF A MORTGAGEE TRANSFERS ONE OF THE NOTES secured by his mortgage, the purchaser acquires an equitable pro rata interest in the security, but no legal title, nor right of foreclosure. (p. 445.)

Spooner & Shelley and Marshall A. Spooner, for the appellant.

William C. Bicknell, for the respondent.

37 START, C. J. This is an appeal by the plaintiff from an order sustaining a **38** general demurrer to its complaint. The material facts alleged in the complaint are to the effect following: A mortgagee in a real estate mortgage containing the usual power of sale and securing five promissory notes of two hundred and eighty dollars each sold one of the notes, which came to the hands of the plaintiff as owner in the usual course of business. No written assignment of the mortgage or any interest therein was ever made by the mortgagee or anyone else. The mortgagee, after default in the conditions of the mortgage, and on February 21, 1895, foreclosed it by advertisement, pursuant to the power of sale therein. In his notice of sale he claimed as due and unpaid upon the mortgage the full amount originally secured thereby. The foreclosure sale was made by the defendant as sheriff, and the mortgaged premises sold for an amount, plus the costs of foreclosure, equal to the entire indebtedness secured by the mortgage, including the amount due upon the note owned by the plaintiff, which was then, and ever since has been, in its actual possession. He had no notice of the foreclosure sale until after the date thereof. The defendant, as sheriff, received the amount for which the premises were sold, and prior to the commencement of this action, which was about February, 1898, the plaintiff demanded from the defendant the amount of his note, and it was refused.

The complaint does not allege that the defendant had any knowledge at any time that the plaintiff was the owner of one of

the notes secured by the mortgage, or that he had any interest or equity in the proceeds of the foreclosure sale, or that the defendant had in his hands such proceeds, or any part thereof, at the time such demand was made. The appellant, however, claims that it appears from the complaint that the defendant still retains in his possession the proceeds of the foreclosure sale, because it is alleged therein that they were paid to him at the time the sale was made, some three years before the commencement of this action. Such is not the necessary or reasonable inference from the allegations of the complaint. The rule that a condition of things once shown to exist is presumed to continue until the contrary is made to appear has no application to this case, for it was not the duty of the sheriff to retain the money, ⁸⁰ but to pay it to the party appearing to be entitled thereto; and it cannot be presumed that he neglected his duty in this respect for the purpose of helping out the allegations of the complaint.

The only question, then, for our decision, is whether a sheriff who makes the sale on the foreclosure by the mortgagee of a real estate mortgage by advertisement, and pays the whole proceeds of the sale to him, without any notice that one of the notes secured by the mortgage has been sold to a third party, is liable to such party for the amount of his note. We answer the question in the negative. The plaintiff, by the transfer of one of the notes secured by the mortgage, acquired an equitable pro rata interest in the security, but no legal title to the mortgage, nor any right to exercise the power of sale by virtue of which the mortgage was foreclosed. The legal title to the mortgage and the right to exercise the power of sale remained in the mortgagee, and he alone had the right to foreclose the mortgage by advertisement. But he held the plaintiff's equitable pro rata interest therein in trust for him, and when he received the proceeds of sale he held so much thereof as belonged to the plaintiff in trust for him: *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907; *Botineau v. Aetna L. Ins. Co.*, 31 Minn. 125, 16 N. W. 849; *Solberg v. Wright*, 33 Minn. 224, 22 N. W. 381; *Burke v. Backus*, 51 Minn. 174, 178, 53 N. W. 458. It was the right and duty of the defendant, as sheriff, to pay the whole amount necessary to satisfy the mortgage to the mortgagee, who had the sole legal right to foreclose it by advertisement, unless he had notice of the plaintiff's interest therein. The complaint does not state a cause of action, because it fails to allege that the defendant had such notice.

Order affirmed.

Mortgage.—A transfer of one of several notes secured by a mortgage is an assignment pro tanto of the mortgage: *State Bank v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930; *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452; and authorizes the transferee to foreclose such note under the power in the mortgage: *Brewer v. Atkelson*, 121 Ala. 410, 77 Am. St. Rep. 64, 25 South. 992.

MASTAD v. SWEDISH BRETHREN.

[88 Minn. 40, 85 N. W. 913.]

LIQUOR SELLER'S LIABILITY FOR ASSAULT.—A person managing a public place of amusement who sells liquor to one in attendance, rendering him drunk and disorderly, is liable for an assault by him upon another patron. (p. 448.)

John W. Arctander, for the appellant.

A. B. Darelus and F. N. Hendrix, for the respondent.

⁴⁰ **BROWN, J.** Appeal from an order sustaining a general demurrer to the complaint. The complaint alleges, substantially, that defendant is a corporation. The character and nature of its business is not stated. That on June 11, 1899, defendant held or gave a picnic on certain grounds at Lake Minnetonka, invited the general public to attend the same, sold tickets of admission thereto, and undertook to protect persons so invited, who bought tickets ⁴¹ and attended the picnic, from assaults by ruffians and drunken people. That plaintiff bought a ticket and spent the day on the grounds. That during the whole of the day, and through a committee appointed for such purpose, defendant unlawfully, and without license, sold intoxicating liquors on such picnic grounds to all who desired to purchase the same, although it was well aware that the sale of such liquors would be likely to cause persons to become drunk, violent, and dangerous, and likely to commit assaults and other breaches of the peace. That defendant knew that one Charles Olson, who was an attendant at the picnic, was liable to drink to excess, and when under the influence of intoxicants was an ugly and dangerous person, and likely to commit assaults on peaceable persons. That, nevertheless, defendant wrongfully and unlawfully sold him large quantities of such liquors, and to such an extent as to render him drunk and disorderly; and although defendant had undertaken to protect

plaintiff while on the grounds from assaults at the hands of such persons, it carelessly and negligently failed to procure police protection, or to provide or appoint persons who could maintain peace and order. That the said Olson, after being so made intoxicated, and by reason thereof, without cause or provocation assaulted, beat, and bruised plaintiff. The plaintiff asked to recover against the defendant damages for such assault. Defendant demurred to the complaint, which was sustained by the court below. Plaintiff appeals.

It is not only alleged in the complaint that defendant made Olson drunk, knowing him to be a dangerous and quarrelsome person when in that condition, and negligently failed and neglected to provide protection from his assaults and insults, but that defendant made the sale of liquor to him unlawfully, and without license. Whether defendant would be liable for the conduct of Olson, and for assaults committed by him while intoxicated, because of the fact that the sale of the liquor to him was unlawful, and without license, we need not determine. The cases cited by counsel for appellant sustain the affirmative of the proposition on principle, but as it is not necessary to a decision of this case, we pass the question for future consideration.

⁴² The case made by the complaint is similar to those holding a railroad company liable for assaults committed upon passengers by fellow passengers, and similar to the rule of law applicable to hotel-keepers with respect to the responsibility of the keeper for the property and effects of his guests, and the proprietors of other public places. The rule with respect to railroad companies as carriers of passengers is stated in clear language in *Mullan v. Wisconsin C. Co.*, 46 Minn. 474, 49 N. W. 249, to the effect that a railroad company as a carrier of passengers is bound to exercise the utmost diligence in maintaining order, and guarding the passengers against violence from whatever source arising, which might reasonably be anticipated, or naturally expected to occur, in view of all the circumstances, and the number and character of persons on board. This rule, of course, applies to drunken persons permitted by the railroad company to remain upon their train, is not limited to persons the company may have made intoxicated by the unlawful or other sale of intoxicants to them, but extends as well to those who became intoxicated elsewhere, and go aboard the train in that condition. If they be permitted to remain passengers, and commit assaults upon other inoffending passengers, and such

assaults are such as might reasonably be anticipated from the condition of the drunken passenger, the company is liable.

The same principle is applied to hotel or inn keepers. All who engage in a public business of that nature are bound to protect their guests, both in person and property, from acts and misconduct of wrongdoers permitted to remain upon the premises; and the rules of law applicable to the common carrier are applicable alike to them: Bishop's Noncontract Law, sec. 1173.

If such is good law as to the railroad company and as to the innkeeper—and there is no doubt but that it is—the same rule should apply, though, perhaps, with a lesser degree of care, to a person engaged in the sale of intoxicating liquors at a public entertainment given and controlled by him, which the public are invited to attend upon payment of an admission fee, and who sells such liquors to a person in attendance at the entertainment ⁴³ he well knows to be violent and disorderly when intoxicated.

There is no reason on principle why a person owning and controlling such a place, who sells his wares to such a person, knowing his ugly and quarrelsome disposition when intoxicated, should not be bound to exercise at least reasonable care to protect his other guests from his assaults and insults. The proprietor of such a place has the undoubted right to exclude therefrom drunken and disorderly persons, and the right to remove and expel them when they become in that condition and disorderly, and likely to produce discord and brawls. Being clothed with such power and authority, a corresponding duty to do so in the interests of law and order, and for the protection of his other guests, should be imposed as a matter of law. We are now speaking of a person lawfully engaged in the business stated in the complaint and not of one who violates the law by sale of intoxicating liquors without license. The case of *Rommel v. Schambacher*, 120 Pa. St. 579, 6 Am. St. Rep. 732, 11 Atl. 779, is squarely in point. It is there said: "If, on the other hand, he was guilty of making Flanagan drunk, or if he came there drunk, and Schambacher knew that fact, he was bound to see that he did no injury to his customers. All this is a plain matter of common law and good sense, and does not depend on the act of 1854, or any other statute. Where one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults and insults as well of those who are in his employ as of the drunken and vicious men whom he may chose to harbor."

In line with these principles we therefore hold that a person having the management and control of a public place of amusement, which he invites the public, on payment of an admission fee, to attend, and at which he sells to his customers intoxicating liquors, who sells to one in attendance at such place intoxicating liquor to such an extent as to render him drunk and disorderly, well knowing that when in that condition he is likely to commit assaults upon others without provocation or cause, is bound to exercise reasonable care to protect his other patrons from his assaults and insults, and for a failure to do so is liable in an ⁴⁴ action for damages to one assaulted and injured by such person.

The point is made by respondent that the complaint does not allege that defendant owned and controlled the picnic grounds. There is no direct allegation of either fact, but the complaint does allege affirmatively the facts from which its control of the picnic grounds may be fairly and reasonably inferred. The complaint is sufficient in this respect: *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, 33 N. W. 214.

The case of *Swinfin v. Lowry*, 37 Minn. 345, 34 N. W. 22, is not in point. Defendant in that case was not the proprietor of a public place where intoxicating liquors were sold, and the trial disclosed no duty on his part to protect persons from the assault of the intoxicated person. Such duty clearly follows from the relation of the parties in the case at bar, and on this ground is distinguishable from the *Swinfin* case.

Order reversed.

OF THE LIABILITY OF LIQUOR SELLERS FOR THE ACTS OF PERSONS BECOMING INTOXICATED.

- I. Personal Injuries in General.
- II. Assault and Battery.
- III. Homicide.
- IV. Suicide.
- V. Crimes Resulting in Imprisonment.
- VI. Acts Respecting Property in General.
- VII. Mismanagement of Horses and Teams.
- VIII. Who are Liable for Acts of an Intoxicated Person.
- IX. Contributory Acts of Injured Party.
- X. Damages.

I. Personal Injuries in General.—Independently of statutes, it is the duty of the proprietor of a saloon or tavern, open for public entertainment, to see that one who enters it is protected, not only from the assaults and insults of those in his employ,

but of those whom he may choose to harbor. Such proprietor is liable for injuries sustained by one who comes into his place and becomes intoxicated, by reason of another, who also becomes intoxicated there, and who, in view of the proprietor, attaches a piece of paper to the former and sets it on fire: *Rommel v. Schambacher*, 120 Pa. St. 579, 6 Am. St. Rep. 732, 11 Atl. 779, cited and relied upon in *Mastad v. Swedish Brethren*, the principal case, ante, p. 446.

Under the civil damage acts, giving to anyone injured in his person, property, or means of support a right of action against the person causing the intoxication, an action lies for direct injuries done by the intoxicated person, as well as for damages arising from the intoxication. Thus, where an intoxicated person in flourishing a pistol shoots and wounds another, the latter has a cause of action against the persons causing the intoxication by selling liquor to the one doing the injury: *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14. And a wife may recover damages from one who sells liquor to her husband and another, making them drunk, in which condition they engage in a scuffle, in the course of which the husband's leg is broken: *Thomas v. Dansby*, 74 Mich. 398, 41 N. W. 1088.

II. Assault and Battery.—A liquor seller, under the civil damage acts, is liable to a stranger who is assaulted by an intoxicated person, whose intoxication such liquor seller has contributed to by furnishing liquor: *English v. Beard*, 51 Ind. 489; *Bodge v. Hughes*, 53 N. H. 614; *Bacon v. Jacobs*, 63 Hun, 51, 17 N. Y. Supp. 323. And, apart from statute, he is liable where the person assaulted is one of his patrons or customers: See *Mastad v. Swedish Brethren*, the principal case, ante, p. 446.

A wife may recover against a saloon-keeper for an assault upon her by her husband while he was intoxicated by liquor furnished him by the saloon-keeper: *Wilson v. Booth*, 57 Mich. 249, 23 N. W. 799.

III. Homicide.—A homicide committed by an intoxicated person is an injury within the meaning of statutes giving a cause of action for injuries to person, property, or means of support in consequence of the intoxication of any person: *Jackson v. Brooks*, 5 Hun, 530.

Accordingly, if an intoxicated person kills another, the wife of the deceased has a right of action against the one who furnished the liquor: *Pickard v. Teatro*, 34 Ill. App. 398; *England v. Cox*, 89 Ill. App. 551; *Munz v. People*, 90 Ill. App. 647; *Brockway v. Paterson*, 72 Mich. 122, 40 N. W. 192. See, also, *Doty v. Portal*, 87 Mich. 143, 49 N. W. 534; and compare *Belding v. Johnson*, 86 Ga. 177, 12 S. E. 304. And if an intoxicated person kills a woman, her husband may recover from the seller of the liquor for

the loss of her society and the comforts of home: *Fortier v. Moore*, 67 N. H. 460, 36 Atl. 369. A mother may maintain an action against the vendor of liquor for loss of support, where her son and another become intoxicated on the liquor furnished and engage in wrangle, in which her son is killed: *McClay v. Warrell*, 18 Neb. 44, 24 N. W. 429.

IV. **Suicide.**—The suicide of an intoxicated person creates a liability, under the civil damage acts, against him who supplied the liquor. Thus, a wife of one who takes his own life while under the influence of liquor may recover damages from the vendor of the liquor: *Blatz v. Rohrbach*, 42 Hun, 402. So she may recover when her husband, while intoxicated, shoots her and then kills himself: *Lawson v. Eggleston*, 52 N. Y. Supp. 181, 28 App. Div. 52, affirmed in 164 N. Y. 600, 50 N. E. 1124. And where the father of the minor plaintiff, while intoxicated on liquor sold him by the defendant, murdered the plaintiff's mother and committed suicide, the plaintiff being dependent on his father for support, the defendant was held liable: *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

V. **Crimes Resulting in Imprisonment.**—The authorities are not harmonious on the question of whether a liquor seller is liable to a wife where he has sold liquor to her husband, causing his intoxication, and he, while intoxicated, commits a crime for which he is convicted and imprisoned. In Pennsylvania, where a husband committed a homicide for which he was imprisoned for life, it was held that the imprisonment was not the direct and proximate consequence of the sale of the liquor, and hence she could not recover for the imprisonment: *Bradford v. Boley*, 167 Pa. St. 506, 31 Atl. 751. In harmony with this doctrine, in *Denison v. Van Wormer*, 107 Mich. 471, 65 N. W. 274, a recovery was denied a wife where her husband committed a burglary, for which he was sentenced to imprisonment for three years.

On the other hand, it is held in Indiana and New York that a wife may recover for the imprisonment of her husband for a homicide committed by him while drunk: *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154; *Beers v. Walhizer*, 43 Hun, 234. In this last case it was contended, said the court, that "it does not appear that the loss of means of support sustained by the plaintiff was the direct result of the intoxication; that the arrest, trial, and conviction of the plaintiff's husband by the officers of the law, and which resulted in his imprisonment, was the cause that produced that result, and was wholly independent of the intoxication produced by the liquor sold by the defendant George, and for that reason no cause of action was alleged against them within the provisions of the said act.

"The homicide committed by Beers was a crime punishable by imprisonment, and his arrest, conviction, and sentence was a result to be anticipated, and as a matter of course, by the force and operation of the law of the land. The conviction of Beers was not the cause of his imprisonment, but was the result of the crime which he perpetrated in killing Banfield, and that act was the direct and only cause in the eye of the law for his incarceration. Under the act it is necessary that two facts should concur besides the sale or gift of the liquor by the defendant to constitute a cause of action, to wit, intoxication resulting from its use, in whole or in part, and the loss of the means of support by the plaintiff in consequence of such intoxication. The statute requires nothing more. The act itself establishes a rule of evidence applicable to and controlling in all cases arising under its provisions, which in some respects is new, and has produced a radical change of the common-law rule. The statute makes no distinction whether the loss of the means of support is the direct or remote result of the intoxication. It only requires that it should be established that the loss of the means of support is the result of such intoxication."

VI. Acts Respecting Property in General.—A wife may maintain an action, under the civil damage acts, against a liquor seller to recover the value of her chattels which her husband sold while intoxicated: *Woodheather v. Risley*, 38 Iowa, 486; and without first demanding their return from the vendee: *Mulford v. Clewell*, 21 Ohio St. 191. She may also recover damages sustained by reason of her money being spent by her husband for liquor, or squandered by him when intoxicated, or in the saloon of the vendor of the liquor: *Greenlee v. Schoenheit*, 23 Neb. 669, 37 N. W. 600.

But where one brings an action against a saloon-keeper for damages alleged to have been sustained by disposing, for less than its value, of his own property, while intoxicated, it is error for the court to charge the jury that they may award such damages as the plaintiff has sustained, in the absence of any evidence of the value of the property: *Roberts v. Hopper*, 55 Neb. 599, 76 N. W. 21.

VII. Mismanagement of Horses and Teams.—The owner of a horse may maintain an action for damages against the seller of liquor, when the person to whom it is sold becomes intoxicated and overdrives the horse so that it dies: *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; or permits the horse to run away, whereby he is killed; *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42.

So the liquor seller is liable to a third person for injury to himself and his horse, caused by an intoxicated person driving reck-

lessly against his horse and vehicle: *Flower v. Witkovisky*, 69 Mich. 371, 37 N. W. 364; *Wright v. Treat*, 83 Mich. 110, 47 N. W. 243. And if the intoxicated person drives a team, behind which the plaintiff and his wife are riding, so recklessly as to upset the vehicle and injure her, the husband may recover for the loss of services, the expense of medical attendance, and the like: *Aldrich v. Sager*, 9 Hun, 537.

VIII. Who are Liable for Acts of an Intoxicated Person.—For an injury inflicted by an intoxicated person, all are liable, under the civil damage acts, who separately sold liquor to him: *Bodge v. Hughes*, 53 N. H. 614. This does not hold, however, where the sales of different dealers cause separate and distinct intoxications: *Jewell v. Welch*, 117 Mich. 65, 75 N. W. 283.

To charge a party with liability for the acts of an intoxicated person, the liquor must be furnished by such party to the person whose intoxication is the foundation of the charge of liability for the injury. A liquor dealer is not liable for the acts of a drunken man, who did not himself purchase the liquor, but which was purchased by a friend, it not appearing that the intoxicated person participated in such purchase: *Dudley v. Parker*, 132 N. Y. 386, 30 N. E. 737.

IX. Contributory Acts of Injured Party.—A person complaining of the wrongful act of a liquor seller in causing the intoxication of another, from which damage or injury results to him, must not be an active or willing agent in bringing about the intoxication. This consequence arises from the general law of contributory negligence, and applies as well to injuries caused by an intoxicated person as to any other injury arising from the negligence or procurement of the party injured. Thus if one is stabbed by a drunken man whom he has treated and given liquor, thereby contributing to such man's intoxication, he cannot recover from the saloon-keeper: *Hays v. Waite*, 36 Ill. App. 397.

A wife cannot recover against the seller of liquor for injuries inflicted upon her by her intoxicated husband, to whose intoxication she directly contributed: *Engleken v. Hilger*, 43 Iowa, 563. Though if she purchases liquor for her husband under compulsion, or to keep him at home, she does not thereby defeat her right of action: *Ward v. Thompson*, 48 Iowa, 588.

But in *Beem v. Chestnut*, 120 Ind. 390, 22 N. E. 303, it was held that a wife, in her complaint, need not show herself free from contributory negligence, since the sale of the liquor constituted a violation of positive law, and an invasion of her right of personal security, and the doctrine of contributory negligence had no application.

X. Damages.—In an action by a wife for damages against the seller of intoxicating liquor to her husband, threatening language

and vulgar conduct or abuse by cursing her by her husband, not impairing her health, is no ground for recovery. There must be personal violence or physical injury: *Albrecht v. Walker*, 73 Ill. 69; *Calloway v. Laydon*, 47 Iowa, 456, 29 Am. Rep. 487. Mental anguish, disgrace, and loss of society or companionship are not sufficient: *Mulford v. Clewell*, 21 Ohio St. 191.

Still, if sickness is caused by the abuse, a recovery may be had: *Kear v. Garrison*, 13 Ohio C. C. 447. And mental suffering resulting from violent interference with her person is a ground for damages: *Ward v. Thompson*, 48 Iowa, 588. And where an intoxicated husband, without actual violence, but by threats, abuse and intimidation, drives his wife out of doors and keeps her there for several hours, there is physical injury and suffering which suffices to sustain an action against the liquor seller: *Peterson v. Knoble*, 35 Wis. 80.

Exemplary damages, under some of the statutes, may be recovered against a vendor of liquor by one injured by the acts of an intoxicated person: *Peacock v. Oaks*, 85 Mich. 578, 48 N. W. 1062; *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89; *Kear v. Garrison*, 13 Ohio C. C. 447.

MURPHY v. BORDWELL

[83 Minn. 54, 85 N. W. 915.]

A GIFT OF A BANK DEPOSIT may be effected, though there is no change of credit on the books of the bank, by substantial acts of the donor tending to carry the gift into effect, and give the donee dominion over such deposit. (pp. 456, 457.)

F. V. Comfort, for the appellants.

H. H. Gillen, for the respondent.

⁵⁴ LOVELY, J. Plaintiffs recovered judgment against the defendant, Anna Bordwell. Upon proceedings for garnishment in the district court for ⁵⁵ Washington county, a summons was served on the Lumberman's National Bank of Stillwater as garnishee, and made returnable before the clerk to secure for plaintiffs the benefit of property belonging to the defendant in the possession of the bank. At the time designated, plaintiffs appeared before the clerk, also the garnishee, by its cashier, who was sworn for the bank, and disclosed that there was in its possession, at the time of the garnishment, three hundred and thirty-five dollars and seventy-five cents, deposited in the name of the

defendant. At the same time Emma Grant, the claimant, also appeared, asserted a claim to this deposit, asked leave to file her complaint in intervention, and be allowed to make good the same to the fund in the hands of the garnishee. No further action was taken upon this request before the clerk. Afterward, in proceedings before the district court, plaintiffs moved for judgment. The claimant also moved for leave to file complaint in intervention.

The court denied the motion for judgment, and permitted the claimant to intervene, which she did, alleging that at the time of the service of the garnishee summons she was the actual owner of the deposit. Plaintiffs answered, alleging that defendant was the owner of the same. Upon the issue thus made up a trial was had. Findings of fact and law in favor of the claimant were made by the trial court, in which it was found, in brief, that the funds in the bank had been deposited in the name of the defendant, and before the judgment had been rendered they had been donated by the defendant as a gift to the claimant, Emma Grant, who accepted the same, and was, at the time of the garnishment, the owner thereof. A motion for a new trial by plaintiffs was overruled, from which order plaintiffs appeal to this court.

The only question discussed under the assignments of error is the sufficiency of the evidence to sustain the finding of fact to the effect that the money standing as a deposit in the name of defendant, Anna Bordwell, was in reality the property of the intervening claimant, and, if the evidence supports this finding, the order of the trial court should be sustained. The evidence reasonably tends to show that defendant, who was the mother of claimant and another daughter, had received by will from a deceased husband, the father of both daughters, the sum of nine hundred dollars; ⁵⁶ that defendant deposited the same in her own name in the Lumberman's National Bank, intending to donate the same to her daughters, upon the equitable consideration that it should be justly distributed between them on account of their relationship to their deceased father.

One of the daughters was an invalid, and defendant drew five hundred dollars of the deposit from the bank to use in taking her to a health resort. At that time the mother was in the bank with claimant, and expressed a present purpose to give the claimant the remaining four hundred dollars, and, to carry out that intent, directed the cashier of the bank to make out the

necessary writings to enable her to do so. The conversation that occurred at this time between defendant and claimant, as detailed by both, is to the effect that there was an intention to make a gift of this four hundred dollars to the claimant, and that the effective method by which the same was to be transferred was left to the cashier. The cashier wrote out a power of attorney from the defendant to the claimant, authorizing the latter, in the mother's name, to draw her share from the bank, without restriction as to amount or time.

The mother, in her statement before the court, insisted that she knew nothing of the effect of this instrument, but executed it supposing that her intent to give the money deposited to her daughter had been accomplished by that act. The cashier knew nothing of the gift, and supposed that the money on deposit in the name of the defendant was her property, and continued the same to the mother's credit on the books of the bank, but gave to the claimant a check-book. The mother left the city immediately thereafter.

From time to time the claimant drew sums from the bank on the checks, which were each time, as the same were used, filled out by the cashier, claimant signing her mother's name, by herself, as agent, but she appropriated such sums, with no objection from her mother, to her own use, and it appears that the defendant never received nor made any claim thereafter to any portion of this deposit. The checks signed by the daughter, as above indicated, were all written by the cashier at her request, and it appears from the statements of the defendant as well as the claimant, ⁵⁷ that they were ignorant of the legal effect of the power of attorney or of the check-book, but supposed that the gift had been completed, and that the deposit was the property of the claimant. There is no evidence to show a purpose on the part of the defendant to defraud the owner of the judgment or other creditors.

The above is a fair statement of the result of the evidence most favorable to the facts found by the court, in which light we must regard the same, and the only question we can consider upon this appeal is whether the finding of the trial court that there was a valid gift from the defendant to the claimant of the deposit is supported by evidence.

It is insisted for the plaintiffs that there was no delivery of the four hundred dollars to the claimant, or acceptance of the same by her—that the intention to make a gift had not been

consummated. Since there is no proof of a fraudulent intent on the part of the defendant to dispose of the four hundred dollars by gift to her daughter, which, under the circumstances, was a natural and humane intention, in view of the fact that it was a part of the estate of the claimant's father, and might well have been dictated by a natural sentiment of justice and affection by the mother, the simple question arises whether enough was done by the mother to constitute a delivery of the gift and acceptance by the daughter, and this, as between the mother and daughter, cannot be affected in this case by any interest of third parties seeking to collect a claim against the mother.

While it is true that a promise or intention to make a gift in the future, without any act to effectuate the same, will not constitute a donation, yet any substantial act on the part of the owner of the property, tending to carry the gift into effect, and give the donee dominion over the property so that she can appropriate it to her use, will, in the absence of fraud, support such gift: 2 Schouler on Personal Property, 92; *Fletcher v. Fletcher*, 55 Vt. 325; *Ross v. Draper*, 55 Vt. 404, 45 Am. Rep. 624; *Estate of Malone*, 13 Phila. 313; *In re Schmidt's Estate*, 56 Minn. 256, 57 N. W. 453.

While the credit to the mother was not changed on the books of the bank, yet the power of attorney, and the delivery of the ⁵⁸ check-book to the daughter, and her use and appropriation of a part of the money so drawn from the bank, according to the intention of the mother, were acts by which her authority to draw the whole sum, either then or thereafter, from the bank, completed the gift.

The retention by the bank of the deposit in the mother's name is not conclusive as to the ownership of the property: *Ingersoll v. First Nat. Bank*, 10 Minn. 315 (396). Whether it was a fact, as between mother and daughter, that the credit in the mother's name was continued from a misunderstanding by the cashier, in drawing the power of attorney, or the apparent agency of the daughter in drawing the money thereon is opposed to an executed intention by the mother to give the same to her daughter, we must hold that there might have been sufficient investiture of the dominion of the property in the daughter by these acts to execute the gift. That there was such a purpose and intent has been found by the trial court upon sufficient evidence, and the gift must be sustained.

The order of the trial court is affirmed.

Banking.—The ownership of a deposit can be shown to be different from the apparent ownership imported in the bank-book: *Stair v. York Nat. Bank*, 55 Pa. St. 364, 98 Am. Dec. 759.

The Gift of Bank Deposits is discussed in the monographic note to *Williamson v. Yager*, 34 Am. St. Rep. 219-223. Consult, also, the recent cases of *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 890; *Weeks v. Orie*, 94 Me. 458, 80 Am. St. Rep. 410, 49 Atl. 107.

CRANDALL v. GREAT NORTHERN RY. CO.

[88 Minn. 190, 88 N. W. 10.]

RAILWAY ACCIDENT—PROXIMATE CAUSE.—If a railway company places a car without automatic air-brakes in the middle of a train, by reason of which the train becomes divided, and a brakeman in the performance of his duties injured, the disconnection of the air-brake by the insertion of such car is the proximate cause of the injury. (p. 458.)

STATE COURTS DO NOT TAKE JUDICIAL NOTICE OF the common law as applied in various states. (p. 459.)

THE COMMON LAW OF A SISTER STATE is presumed to be the same as in the state of the forum. (p. 459.)

PLEADING.—IT IS NECESSARY TO PLEAD THE COMMON LAW of a sister state, if the pleader relies on it. (p. 459.)

IN PLEADING THE COMMON LAW, OF A SISTER STATE it is sufficient to allege as a fact what the law is, without setting out decisions and other evidence thereof. (pp. 459, 460.)

W. E. Dodge and E. L. Sutton, for the appellant.

Lewis C. Spooner and Marshall A. Spooner, for the respondent.

¹⁹¹ LEWIS, J. The complaint alleges that John Crandall, plaintiff's intestate, was in defendant's employ as a brakeman on one of its freight trains; that it was the custom of defendant to use automatic air-brakes upon all of its freight trains and in making up trains to provide that cars not so equipped be placed in the rear; that upon this occasion, contrary to its rule, defendant placed a certain ¹⁹² freight-car, not so provided, in the middle of a freight train made up of about forty cars, which was otherwise completely equipped with automatic air-brakes; that the effect of placing such car, known as a "jack" car, midway in the train, was that in rounding a sharp curve the coupling of this car broke, dividing the train into two parts; that when the engineer brought the front portion of the train to

a standstill, Crandall, in the performance of his duties as brakeman, was required to go between the engine and first car for the purpose of uncoupling the same, and while so engaged the rear portion of the train came on, colliding with, and driving the front portion against the engine, causing the injuries from which death ensued. The specific act of negligence charged against appellant is the breaking of its system of air attachments on the train, by reason of which, when rounding the curve, the back portion broke loose from its forward part, thereby placing it beyond the engineer's control. And respondent's claim is that, had the train not been so segregated, and the usual air attachments severed by reason of placing the "jack" car in the center thereof, the accident would not have happened. It is further stated that this accident occurred in North Dakota, and for the purpose of pleading the law of that state with reference to the liability of appellant for such injury the following allegation was set out in the complaint: "That for a long time, to wit, continuously during all the times since before the said injury occurred to said deceased, as hereinafter stated, it was the law of North Dakota that railroad companies running and operating railroads should be liable and responsible for injuries occurring to their servants through negligence and carelessness of fellow-servants engaged in the same employment and in the same work."

This complaint was demurred to upon the ground that it does not state facts sufficient to constitute a cause of action, and defendant appeals from an order overruling the demurrer.

In our judgment, it appears from the facts pleaded that the disconnection of the air-brake from the rear portion of the train by the insertion of the "jack" car at the point stated was the proximate cause of the injury, and it will not be necessary to discuss that question.

¹⁹³ Appellant insists that the above-quoted allegation as to the law of North Dakota is an insufficient pleading of the law upon that subject, for the following reasons: That, if it is thereby intended to plead a statute of that state, it is not sufficient, because, under the authorities, such allegation would be merely a conclusion of the pleader as to the effect of the statute, and that the only proper way to plead a statute is to set out its terms; or, if it was not intended to plead a statute of North Dakota by such allegation, then it is not a proper pleading of the common law, for the reason that decisions of that state

must be pleaded and set forth showing such to be the common law. In other words, that the allegation amounts to a mere conclusion of the pleader as to what the common law of that state was. It is also claimed that it is unnecessary to plead the common law, for the reason that the court will take judicial notice of such law as applied to a sister state, and that the common law of North Dakota, as applicable to this case, is that under such circumstances the master is not liable for the negligence of a coservant; and, if the court will not take judicial notice of the common law of North Dakota, then such law will be presumed to be the same as that of Minnesota, in which case the master would not be liable.

Respondent admits that he has not successfully pleaded a statute, and we will not consider that point. While it is true that federal courts take judicial notice of the common law, as applied in various states, the state courts do not, and in the absence of a pleading or evidence to the contrary, the common law of a sister state is presumed to be the same as in the state of the forum. Therefore, it became necessary for the pleader in this case, if he relied upon the common law of North Dakota, to plead it. It only remains to inquire whether or not the allegation referred to is, in effect, merely a statement of fact as to what the law was, or if that statement amounts to a conclusion of the pleader as to what the law was as deduced by him from the facts existing in the decisions of the courts.

It is a well-settled rule that the laws of a sister state are to be pleaded and proved the same as any other fact (*Cooper v. Reaney*, 4 Minn. 413 (528); *Brimhall v. Van Campen*, 8 Minn. 1 (13), 82 Am. Dec. 118; *Myers v. ¹²⁴ Chicago etc. Ry. Co.*, 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694; *Thomson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 38 Am. St. Rep. 536, 53 N. W. 1137); and where those laws exist in the form of common law, only to be ascertained by reference to a line of decisions or customs, or rules and practices, it would seem unnecessary and burdensome to compel the pleader to set out in detail decisions, opinions, and expressions of courts in order to lay a foundation for proof of those facts. Those matters are evidence of the law, and, if the ultimate fact which embodies the essence of the law is stated, it is sufficient as a basis upon which to establish such facts by proper evidence. Upon this view of the case we are led to the conclusion that the statement referred to in the complaint is one of an ultimate fact as to

what the common law in North Dakota was upon that subject, and, therefore, the demurrer was properly overruled: *Berney v. Drexel*, 33 Hun, 34.

Order affirmed.

It is Presumed That the Common Law exists in a sister state: *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221, 45 Am. St. Rep. 528, 27 S. W. 453; *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 South. 711; *Birmingham Water Works Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43, 25 South. 806.

Courts do not Take Judicial Notice of the Laws of another state: *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562; *Wilson v. Phoenix Power Mfg. Co.*, 40 W. Va. 418, 52 Am. St. Rep. 890, 21 S. E. 1035. For some purposes courts of one state may take judicial notice of the judicial decisions of other states, but as a matter of law or fact applicable to a particular case, the law of another state, whether declared by decisions or otherwise, must be pleaded and proved: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. Rep. 67, 20 N. E. 287.

GANSER v. GANSER.

[88 Minn. 199, 86 N. W. 18.]

ESTATE OF DECEDENT.—THE RIGHT OF A DISTRIBUTEE to his share of the estate of a decedent accrues at the time of the final decree of the probate court. (p. 462.)

THE STATUTE OF LIMITATIONS BEGINS TO RUN against an action from the time the cause thereof accrues. (p. 462.)

ADMINISTRATOR'S BOND.—THE STATUTE OF LIMITATIONS begins to run against an action by a distributee on an administrator's bond from the time of the final decree of distribution. (pp. 462, 463.)

ADMINISTRATOR'S BOND.—LEAVE TO SUE is essential to the right to commence an action on an administrator's bond, but it is no part of the cause of action. (p. 463.)

J. M. Dunn and E. E. Witchie, for the appellants.

Frederick L. McGhee, for the respondent.

200 BROWN, J. Action to recover upon the bond of an administratrix. The facts are very short. In 1890, defendant, Anna Ganser, was, by the probate court of Ramsey county, duly appointed administratrix of the estate of her deceased husband. She duly qualified as such, and executed the bond on which this action is founded, with the other defendants as sureties. The estate was fully administered, and final account made,

upon which, in the due course of law, the probate court duly made its final decree, distributing the residue of the estate, after allowance of the account of the administratrix, to the heirs of the deceased. The final decree was made in 1891, and, so far as appears, was acquiesced in by all interested parties, and the administration of the estate became then finally ended and closed. Plaintiff is one of the heirs of the deceased, and, as such, entitled to a distributive share of the estate, according to the terms of the final decree. Such share was never paid to him by the administratrix, and he brought this action against her and the sureties on her bond to recover the same. The action was commenced in June, 1900. Prior to the commencement of the action, plaintiff duly obtained leave to do so from the probate court, but the date of order granting it is not stated in the complaint. Defendants, who were sureties on such bond, interposed a general demurrer to the complaint, which was overruled by the district court, and they appealed.

The only question presented by the demurrer is, When did the statute of limitations begin to run against the cause of action set up in the complaint? It was held by this court in the case of *Wood v. Myrick*, 16 Minn. 447 (494), that the statute does not begin to run against such cause of action until leave to sue ²⁰¹ thereon is obtained; and the decision was followed in *Lanier v. Irvine*, 24 Minn. 116. The learned court below applied the rule there laid down, and, if it is to be longer adhered to, the order appealed from must be affirmed. Counsel for appellants request that we take up and re-examine the question, and, if found inconsistent with legal principles, overrule the *Myrick* case. We hesitate long before overruling former decisions of the court, which have become the settled law of the state, lest in doing so we injuriously affect parties in their legal rights or remedies. When such decisions have become a rule of property, they are almost invariably followed, whether right or wrong. The security of the citizen in his constitutional rights requires this. But when the decision is wrong in principle and at variance with sound policy, and the overruling of it will work no mischief, nor interfere with vested or constitutional rights, we know of no rule which requires a continued adherence to it. That the *Myrick* case is wrong in principle, illogical, and inconsistent with the policy of the law on the subject of limitation statutes, is conceded on all hands. Although the case was followed in *Lanier v. Irvine*, 24 Minn. 116, it was discredited

and branded as unsound in principle in the case of *Litchfield v. McDonald*, 35 Minn. 167, 28 N. W. 191, and the last prop taken from under it by the decision in that case, and again in *Hantzch v. Massolt*, 61 Minn. 361, 369, 63 N. W. 1069, where it was held that leave to sue on a probate bond was no part of the cause of action, but only a step in the remedy. After the rendition of those decisions the *Myrick* case was left quite forlorn, and wholly without the first element to sustain it.

The right of a distributee to his share of the estate of a deceased person accrues at the time of the final decree of the probate court. This was held in the *Myrick* case, and there can be no doubt as to the correctness of that decision in that respect. Such distributee may at once, upon the making of the final decree, demand his distributive share, and, if it be not paid to him, maintain an action to recover it. It is elementary that the statute of limitations commences to run against a cause of action from the time it accrues and becomes due and payable, or, as otherwise expressed, the cause of action or suit arises, according to the ²⁰² universal rule in courts of both law and equity, "when and as soon as the party has a right to apply to the proper tribunals for relief": *Wood's Limitation of Actions*, 37. Leave to sue is essential to the right to commence and maintain an action on an administrator's bond, as also a condition precedent to the right to commence an action on a constable's or sheriff's bond; but with respect to both this court has distinctly held that obtaining such leave from the proper court is no part of the cause of action, but merely a step in the remedy: *Stillwater etc. R. Co. v. Stillwater*, 66 Minn. 176, 68 N. W. 836; *Hantzch v. Massolt*, 61 Minn. 361, 63 N. W. 1069. The *Myrick* case is squarely in conflict with these cases, and the rule of law established by them, and also contrary to the spirit, policy and purpose of the statute of limitations. An application of the rule of that case means that the person who has a cause of action upon an administrator's bond, a guardian's bond, or other probate bond, may extend almost indefinitely the time in which he may commence an action thereon by postponing his application for leave to sue, thus practically annulling the statute. This is contrary to the rule applied to all other causes of action, and there is no reason whatever for singling out probate bonds, and permitting the person entitled to sue thereon to fix his own limit of time for the commencement of his action. For these reasons, we feel justified in overruling that case, and we do so.

We are not apprehensive that it will work any mischief, or prejudice any who have relied upon it and delayed enforcing their rights upon some probate bond. It is not at all probable that there are many, if any, distributees or legatees who have quietly slept on their rights, and permitted an administrator or executor to retain their share of the estate after the final decree of distribution, for any considerable length of time. It is fair to assume that all such have promptly applied for whatever has been decreed them from such quarter.

Order appealed from is reversed.

The Statute of Limitations Begins to Run from the time the right of action accrues: *Robinson v. Pittsburgh etc. R. R. Co.*, 52 Pa. St. 334, 72 Am. Dec. 792; *Winchester etc. Turnpike Co. v. Wickliffe*, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866.

Limitations—Administrator's Bond.—Where an administrator dies and his administrator files an account of his intestate's administration, and a decree is made showing a balance due the estate, in a suit by the distributees against the sureties on the bond of the first administrator, the statute of limitations begins to run from the date of the decree: *Williams v. State*, 68 Miss. 680, 24 Am. St. Rep. 297, 10 South. 52.

STATE v. CRESCENT CREAMERY COMPANY.

[83 Minn. 284, 86 N. W. 107.]

CONSTITUTIONAL LAW.—A STATUTE WHICH FORBIDS THE SALE OF CREAM that contains less than twenty per centum of fat is constitutional. (p. 465.)

Durment & Moore and F. W. Zollman, for the appellant.

T. R. Kane, county attorney, and O. H. O'Neill, assistant county attorney, for the state.

284 START, C. J. This is an appeal from the judgment of the municipal court of the city of St. Paul convicting the defendant of the offense of selling cream containing less than twenty per centum of fat, contrary to the provisions of General Statutes of 1894, section 7002. The record contains no settled case or bill of exceptions, but the judgment recites upon its face that before sentence the defendant's counsel moved that the defendant be discharged on the ground that the statute was unconstitutional; hence, the facts charged did not constitute a public offense.

Some technical objections are here made to the complaint, but, so far as appears from the record, they were not made in the court below, and the sole question for our decision is the constitutionality of the statute. It is in these words: "No person shall sell or offer for sale any cream taken from impure or diseased milk, or cream that contains less than twenty per centum of fat. Whoever violates the provisions of this section shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than ten dollars nor more than one hundred dollars."

The defendant claims that this statute, in so far as it prohibits²⁸⁵ the sale of cream solely because it contains less than twenty per centum of fat, is unconstitutional, because it is unreasonable and not a proper exercise of the police power, is based upon an arbitrary classification, and is special legislation, and is an unlawful restraint of trade, and illegally restricts the citizen's right to contract and to pursue a lawful calling, and deprives him of his liberty and property without due process of law.

The section of the statute in question is a part of the general statutes of the state, which were enacted to prevent deception in the sale of dairy products, and its obvious purpose is to fix a standard for cream, and forbid the sale of any cream, as such, which is below the prescribed standard, whereby unsuspecting purchasers may be defrauded. It must be, and is, construed so as to effectuate such purpose. We accordingly hold that the statute in question forbids, and only forbids, the sale of cream, as such, which is below the prescribed standard. So construed, the statute is a proper exercise of the police power of the state, and is valid. Its constitutionality rests upon the same principles as does the validity of statutes prohibiting the sale of milk unless it contains a prescribed percentage of fat and solids, and other similar statutes. The constitutionality of such statutes has been uniformly sustained: *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 644, and notes, 30 N. W. 308; *Commonwealth v. Evans*, 132 Mass. 11; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344, and note; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *City v. Cook*, 38 Mo. App. 660. Counsel for the defendant, while practically conceding the validity of statutes fixing a standard for milk, and forbidding the sale of milk below such standard, seek to distinguish such statutes from statutes of the character of the one we are considering, for the reason that: "Cream is a natural product, and,

when not diseased or impure, is not only harmless, but beneficial as food and for many other purposes, whether it contains ten per cent of fat or thirty-five per cent of fat. It is commonly known that there is no practice of adulterating cream as there is in the case of milk, nor of simulating it as in the case of butter, and that pure cream is wholesome, though it contains less than twenty per centum of fat."

We cannot take judicial knowledge of the supposed facts thus asserted; for, if this is a matter in which we are required to take judicial notice of the facts, we know that it is entirely feasible to mix pure cream with a limited amount of milk, and produce a mixture which may be sold to the inexperienced as pure cream. Undoubtedly, there is less necessity for a statute to prevent deception in the sale of cream than there is of one to prevent fraud in the sale of milk, because the latter may be classed as a necessity, and the former as a luxury, and its sale not as general as that of milk; but the distinction is one of degree, not of principle. In either case the legislature is the sole judge of the necessity and propriety of preventing deception in the sale of the article by appropriate legislation: *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257. And the legislature, by this statute, having, in the exercise of the police power, fixed a standard for all cream to be sold as such, the act is valid.

Judgment affirmed.

A Statute Prohibiting the Sale of Milk to which any foreign substance has been added, or from which any cream has been removed, is constitutional: See the monographic note to *Booth v. People*, 78 Am. St. Rep. 243.

DOLLIFF v. ROBBINS.

[83 Minn. 498, 86 N. W. 772.]

WAREHOUSE RECEIPTS.—THE TRANSFER by indorsement and delivery of receipts for wheat stored confers upon the transferee the title to the grain, and every right and remedy of the holder at the time of the transfer. (p. 468.)

WAREHOUSE RECEIPTS.—THE TRANSFER by indorsement and delivery of receipts for wheat stored passes to the transferee the right of action for its conversion prior to the transfer. (p. 468.)

CONVERSION.—IF A WAREHOUSEMAN, without the consent of the owner of grain, ships it to commission merchants to be sold and applied on his indebtedness to them, and it is so sold and applied, they are liable to the holder of the storage receipts as for a conversion. (p. 469.)

CONVERSION—MEASURE OF DAMAGES.—If a conversion is accidental, under the belief of a right to the property, and without wrongful intent, the measure of damages is the value of the property when taken; but if the conversion is willful and without color or claim of right, the measure is the value of the property at the time and in the condition when demand is made. (p. 470.)

CONVERSION—MEASURE OF DAMAGES.—IF A WAREHOUSEMAN, without the consent of the owner of wheat, ships it to commission merchants, who sell it, the measure of their liability for the conversion is the value of the grain at the time of the demand for its return, less the storage charges and the expense of transportation. (pp. 470, 471.)

F. N. Hendrix, for the appellants.

Wilson & Van Derlip, for the respondent.

499 BROWN, J. Action for damages for the conversion of a quantity of wheat. The cause was tried in the court below without a jury, plaintiff recovered, and defendants appeal from an order denying a new trial.

The facts in the case are as follows: Between September 19, 1899, and May 15, 1900, and perhaps for some time prior to the first-named date, one Walbridge was in the possession of and operating two public warehouses for the handling and storing of grain for others, and was engaged in buying wheat and other grain on his own account, and storing the same in said warehouses. Between the dates stated he received for storage at his said elevators a large quantity of wheat from the farmers in the vicinity of the towns in which the elevators were located, for which he issued to them numerous storage tickets, evidencing the receipt of the wheat, and the kind and grade thereof. Two of the elevators so operated by Walbridge were located, one at Belleview, in Redwood county, and one at Echo, in Yellow Medicine county. The tickets issued for the wheat so received by him were in the usual form, and in compliance with the statutes on the subject. On August 30, 1899, defendants loaned to said Walbridge the sum of twenty-five thousand dollars, and later on, and at different times, additional sums, aggregating in the neighborhood of thirty-five thousand dollars. To secure the payment of this indebtedness, Walbridge issued and delivered to defendants four certain storage receipts, purporting to be for wheat deposited by them in said elevators, though none

was ever in fact so deposited by them. From time to time, between the dates aforesaid, Walbridge shipped out of his said elevators to defendants, who are commission merchants doing business at ⁵⁰⁰ Minneapolis, Minnesota, all the wheat he had received in store therein, to be sold by them, and the proceeds applied to the payment of the indebtedness due them. Defendants received said wheat, sold it, and credited the proceeds to the account of Walbridge. The wheat so shipped to them included the wheat represented by the tickets issued and delivered to the farmers aforesaid, which are now owned by the plaintiff. Long prior to the commencement of this action, but subsequent to the shipment and delivery of the wheat to defendants, the persons to whom the storage tickets therefor were so issued by Walbridge sold, indorsed, and delivered the same to plaintiff in this action, who has since remained, and is now, the owner thereof. On July 6, 1900, plaintiff produced and tendered to defendants the storage receipts, and demanded of them the delivery of the wheat represented thereby, which demand was refused, and this action followed. Three questions are presented in this court: 1. Whether the indorsement and delivery of the storage tickets to plaintiff operated as an assignment of the cause of action for the conversion of the wheat, and, in this immediate connection, whether plaintiff in fact owned the tickets; 2. Whether defendants are liable in this action as for a conversion of the wheat; and 3. If they are, the measure of plaintiff's damages.

1. Appellants contend that because of the fact that the wheat represented by the storage tickets held by plaintiff had been shipped out of the Walbridge warehouses, and sold, and converted by defendants, prior to the transfer of the tickets to him, the mere indorsement and delivery of the tickets did not operate as an assignment of the cause of action for the conversion. We are unable to concur in this contention. The tickets here in question were issued by Walbridge as a public warehouseman, and their validity, force, and effect are controlled by the general statutes of the state on the subject. By statute, such tickets are made transferable and negotiable by indorsement and delivery. They are negotiable—not, perhaps, to the full extent of bills of exchange and promissory notes, but to the extent of transferring the title to the property to an indorsee or purchaser, together with all rights and remedies of the holder. They are contracts, ⁵⁰¹ in every sense of the term, and the assignment thereof must, in the nature of things, carry with it all rights incident thereto.

The general rule of law with reference to storage tickets of this character, whether issued pursuant to some statutory requirement or otherwise, is that the sale of the tickets by indorsement and delivery operates as a transfer to the indorsee or purchaser of the legal title to the commodity represented thereby, and the warehouseman becomes liable to the indorsee to the same extent as to the original holder. And in case of such indorsement and transfer the indorsee may maintain an action against the warehouseman for injury to the property, whether the injury occurred before or after the transfer of the ticket: *Sargent v. Central*, 15 Ill. App. 553.

This court has on several occasions given utterance, in explicit language, to its opinion as to the character of storage tickets issued by public warehousemen. It was said in *Thompson v. Thompson*, 78 Minn. 379, 385, 81 N. W. 204, 543 (the court speaking through Justice Lovely), that "the tickets designating the amount of grain, charge for storage, and the ownership of the property pass from hand to hand among our citizens, in ordinary commercial transactions, in lieu of the grain itself, and are symbolic, both of the title which actually passes by such transfers, and of the money value which the property is worth at any given time": See, also, *State v. Cowdery*, 79 Minn. 94, 97, 81 N. W. 750; *State v. Loomis*, 27 Minn. 521, 8 N. W. 758. So there can be no doubt that a transfer by indorsement and delivery of storage tickets of this kind passes to the indorsee or purchaser not only the title to the wheat evidenced thereby, but all rights and remedies possessed by the holder at the time of such transfer, as well. And we hold, without further remark, that the transfer of the storage tickets in question to plaintiff conferred upon him title to the wheat, and every right and remedy which the holders thereof possessed at the time of the transfer. The mere fact that there may have been some secret agreement or understanding between the ticket holders and plaintiff to the effect that the transfer was to be considered as conditional is immaterial, and ⁵⁰² there was no error in the ruling of the court below on this subject. The tickets were in fact transferred by indorsement and delivery, thus conveying to plaintiff the legal title and all rights incident thereto; and the original holders could not thereafter, as to these defendants, or others who might deal with plaintiff as the owner of the tickets, be heard to assert or claim any right reserved in them of which no notice was given.

2. It is claimed by defendants that they were, in the matter of the sale of the wheat in question, the agents of Walbridge, the warehouseman, were innocent of any wrongdoing, had no notice, actual or constructive, of the rights of the ticket holders or plaintiff, and are not liable for the conversion of the wheat. The case of *Leuthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218, is cited in support of this contention. The question as to the extent of the liability of a commission merchant who acts as an agent for a warehouseman at a distant point in the matter of receiving and disposing of grain shipped to him by such warehouseman, and who has no interest in the sale of the grain or its proceeds, and acts purely and solely as an agent, is not before the court in this case. The *Leuthold* case is not in point. In that case the defendant in fact acted in the capacity of agent, and there was no intentional or other wrongful act on his part; nor was he in any way, so far as the record of the case discloses, interested in the property or its proceeds. In the case at bar, however, defendants were more than the mere agents of Walbridge. They held an indebtedness against him; had taken storage tickets from him purporting to be for wheat deposited by them in his elevators, though no wheat was by them ever so deposited, as security for the payment of that indebtedness. They had in fact no claim to the wheat in question, but it was shipped to them by Walbridge, to be by them sold and applied upon his account and indebtedness. They were interested parties, not mere agents. They acted in their own interests, and the principle of the *Leuthold* case has no application.

3. The last question presented in the case is as to the measure of damages. The wheat, as we have noted, was stored in the Belleview and Echo elevators. The storage tickets provided for its return and delivery to the holder of the tickets upon demand and payment of storage charges. So long as no demand for the return of the wheat was made, Walbridge remained lawfully entitled to its possession and to its control. But upon demand and tender of such charges the holder became entitled to the return of the wheat or its value. Plaintiff saw fit to permit the wheat to remain with Walbridge until July 6, 1900, at which time he demanded of him its return, and, upon learning that it had been shipped to defendants, in turn demanded it of them. They refused to deliver it, and plaintiff contends that he is entitled to recover the value of the wheat on that date, with interest. It is claimed on the part of defendants that the measure

of plaintiff's damages should be the value of the wheat at the time of the actual conversion, namely, at the time when the wheat was shipped to them by Walbridge.

Two rules upon the subject of the measure of damages in actions for the conversion of personal property are recognized and supported by decisions of this court. They are referred to in the following cases: *State v. Shevlin-Carpenter Co.*, 62 Minn. 99, 64 N. W. 81; *King v. Merriman*, 38 Minn. 47, 35 N. W. 750; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561; *Hinman v. Heyderstadt*, 32 Minn. 250, 20 N. W. 155; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491. The rules established and laid down by these cases are: 1. Where the conversion is accidental, and under the belief that the person has the right to the property, and acts with no wrongful purpose or intent, the measure of damages is the value of the property at the time of the actual taking and conversion; 2. But, where the original taking and conversion is willful and without color or claim of right, the measure of damages is the value of the property at the time and in the condition it is in when demand for its return is made. And in such cases it is not material that the wrongdoer has changed the character of the property, or by improvements greatly enhanced its value. In all cases where there is no willful or intentional wrongful act, the purpose of the law is to secure to the injured party compensation for the loss of his property. And the rule which will secure to him fair and reasonable remuneration ⁵⁰⁴ for his loss is the one to be applied. Within these rules, the court is of opinion (there being nothing in the record to show a willful or wrongful conversion on the part of defendants, nor any evidence showing gross neglect on their part to ascertain the rights of plaintiff) that plaintiff should recover the value of the property at the time of the demand for its return, less the storage charges and the expense of transporting it from the warehouses to Minneapolis, where it was sold. We adopt the time of the demand because the property was rightfully detained from plaintiff until that date, and it cannot be said to have been actually converted by defendants until the demand was made. He had the right to permit the wheat to remain in the warehouse, in the hope and anticipation of a rise in its value, and to adopt the contention of defendants that their liability should be limited to the value of the wheat at the time they received it would deprive him of that right and permit them to fix the value of plaintiff's property, and thus

determine the measure of his damages. This would be in contravention of the spirit of our warehouse laws, and we cannot adopt it.

The writer of this opinion does not concur with the majority of the court in holding that there should be deducted from plaintiff's recovery the amount of storage charges due Walbridge. The claim for such charges belongs solely to Walbridge, and was not transferred to defendants by their wrongful conversion of the wheat. But the majority think the amount should be so deducted from plaintiff's recovery, and it will be so ordered.

It is, therefore, ordered that the order appealed from be affirmed, on condition that the plaintiff remit from the recovery, within ten days after remittitur is filed in the court below, the charges due Walbridge for storing the wheat, and the freight charges for transporting the same to Minneapolis. If plaintiff shall fail to so remit within the time aforesaid, the order appealed from will be reversed, and a new trial granted.

Warehouse Receipts.—The indorsement and delivery of warehouse receipts transfer the legal title to the property: *State Bank v. Warehouse*, 70 Conn. 76, 66 Am. St. Rep. 82, 38 Atl. 904; *Anderson v. Portland Flouring Mills*, 37 Or. 483, 82 Am. St. Rep. 771, 60 Pac. 839. In the absence of a statutory provision, however, such receipts are not negotiable: *Note to Rice v. Cutler*, 84 Am. Dec. 753; *Solomon v. Bushnell*, 11 Or. 277, 50 Am. Rep. 475, 3 Pac. 677; and though they are made negotiable by statute (*Hanover Nat. Bank v. American Dock etc. Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72; *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918), they do not possess negotiability in the full sense of that term: *Anderson v. Portland Flouring Mills Co.*, 37 Or. 483, 82 Am. St. Rep. 771, 60 Pac. 839; *Commercial Bank v. Hart*, 99 Ala. 180, 42 Am. St. Rep. 38, 12 South. 568.

Trover.—The Measure of Damages in an action of trover is the value of the property at the time of conversion, with interest: *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238, 40 Atl. 138; *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159, 19 South. 860; *Omaha etc. Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185, 21 Pac. 925. But its enhanced value may be considered if the conversion was willful: See the monographic note to *Baker v. Wheeler*, 24 Am. Dec. 73. Consult, also, the note to *Wooley v. Carter*, 11 Am. Dec. 523-528.

TAYLOR v. TIMES NEWSPAPER COMPANY.

[83 Minn. 523, 86 N. W. 760.]

ACCOUNTING.—IF A NEWSPAPER COMPANY agrees to examine a plan to increase its advertising business, and, if it should make use thereof, to pay the originator a percentage on the receipts for advertising during certain periods, the proper form of action to enforce liability for such use is for an accounting. (p. 475.)

LIQUIDATED DAMAGES OR PENALTY.—The sum fixed by the parties to a contract for its breach is to be treated as liquidated damages, if the damages are uncertain, difficult to ascertain, and speculative, and the contract furnishes no data for their ascertainment. (p. 476.)

LIQUIDATED DAMAGES.—IF A NEWSPAPER COMPANY agrees to examine a plan to increase its advertising business, and, if it should make use thereof, to pay the originator a certain per centum on the gross receipts for all advertising run within certain periods, the sum stipulated for such use must be treated as liquidated damages and not as a penalty. (p. 477.)

CONTRACT—CONSTRUCTION OF.—IF A NEWSPAPER agrees to examine a plan to increase its advertising business, and if it should make use thereof to pay the originator a certain per centum "on gross receipts for all classified advertising run" during certain periods, the percentage is to be computed only on the increased volume of business attributable to the use of the plan. (p. 477.)

Suit for an accounting, dismissed on motion of defendant, and the plaintiff appealed from an order denying him a new trial.

Charles Butts and E. R. Holcombe, for the appellant.

A. B. Jackson, for the respondent.

524 BROWN, J. Action for an accounting. The cause was dismissed in the court below after plaintiff had rested his case, and plaintiff appeals from an order denying a new trial.

The facts, concisely stated, are as follows: Plaintiff, claiming to have originated a plan for increasing the advertising business of newspapers, solicited defendant to purchase it for a specified consideration. Not being familiar with the plan, defendant agreed to examine it, and, if satisfied of its merits, to purchase the right to use it, whereupon the parties entered into a preliminary agreement, the material portions of which are as follows: "We hereby agree that if, after you have submitted your plan for development of classified advertising in the Minneapolis

“Times,” we decide to adopt it, we will enter into formal contract with you, on terms to be mutually agreed upon, before putting your plan into operation. However, should we, without your permission, at any time within two years use any part of it, even if modified somewhat in form, we agree to pay you the commission which you ask for the plan—forty per cent on gross receipts for all classified advertising run in all editions of our paper during first year, twenty per cent during the second year, and ten per cent during third year. If, after going into details, we do not think your plan suited to our needs, we will so inform you at once, so that you may open negotiations with any other newspaper in this city. We further agree not to give to anyone, directly or indirectly, connected ⁵²⁵ with or interested in any newspaper outside of this city, any of the details of your plan.”

Upon signing and delivering this preliminary agreement, defendant received and examined the plan, and, deeming it of no merit, returned it to plaintiff, with the statement that it did not care to complete the contract of purchase. This action was subsequently brought, upon the claim of plaintiff that defendant had adopted and made use of the plan in its business; an accounting is asked of all advertising run in defendant's newspaper from and during the time it so used it; and a recovery is demanded for the amount stipulated to be paid by the terms of the agreement. As stated, at the close of plaintiff's case the court below dismissed the action on motion of defendant. The ground of this ruling was that the plaintiff had mistaken his remedy; that he should have brought, instead of an action for an accounting based upon the contract, an action for damages for its breach.

Counsel for defendant contends in this court that the preliminary contract upon which the action is founded was never executed by the defendant corporation, or, rather, that the evidence is insufficient to show that the officer who signed and executed it had authority to do so, and denies that defendant violated the terms of agreement by adopting or making use of the plan, and also claims that the contract is void, within the statute of frauds, because by its terms it is not to be performed within one year. The preliminary agreement was entered into on behalf of defendant by its superintendent of advertising, McConn. While the evidence is not clear with reference to his authority, it is sufficient to raise an issue of fact, and to require a finding upon the question one way or the other. And the evidence is

also sufficient to require a finding upon the question whether defendant made use of the plan subsequent to the making of the preliminary agreement. The court should have found on both of these issues, and, if in plaintiff's favor, proceeded with the question of damages. We do not regard the claim that the contract is void, within the statute of frauds, as worthy of any very serious consideration. Contracts held void under the first subdivisions of General Statutes, 1894, section 4209, are such ⁵²⁶ only as cannot, by their terms, be performed within a year; and the contract or preliminary agreement here under consideration does not come within that class. It was not necessary that the consideration therefor be expressed in writing.

We come, then, directly to the principal questions in the case, namely: 1. Whether the action was properly brought upon the contract; and 2. Whether the sum stipulated therein to be paid by defendant in case it adopted or made use of the plaintiff's plan in its business should be treated as liquidated damages or as a penalty.

The agreement between the parties expressly provided for the submission of the plan to defendant for inspection and examination, and that, should defendant make use of it in its business, even in a modified form, without the consent of plaintiff, it agreed to pay forty per cent on gross receipts for all classified advertising run in all editions of its paper during the first year, twenty per cent during the second year, and ten per cent during the third year. The theory of the complaint is that defendant did make use of the plan submitted to it, and that by reason thereof it incurred a liability to pay the damages specified, and it is upon this agreement that the action is founded. We have no doubt of the correctness of plaintiff's position in this respect. The right of recovery, if any exists, is upon the agreement of defendant to compensate plaintiff in case it should adopt or employ his plan in procuring advertisements for its paper. And we think the court below was in error in holding that the action should have been one for damages for a breach of the contract. The only breach we discover from the pleadings or the evidence is in defendant's failure to pay for the use of the plan the stipulated per cent provided for. So it must be held that the action was properly brought for an accounting.

This brings us to the most important question in the case—namely, whether the sum stipulated by the contract is to be treated as liquidated damages or as a penalty. If the sum so

fixed is to be held as liquidated damages, the plaintiff is entitled to recover that sum, if defendant made use of the plan; but if the sum so named is to be treated as a penalty, then the action was properly ⁵²⁷ dismissed, and the order appealed from should be affirmed, because plaintiff failed to prove any actual damages. The solution of the question whether the amount stipulated in a contract to be paid in case of a failure of compliance therewith is to be treated as an agreement for liquidated damages or as a penalty is often attended with much difficulty. The question is to be determined in every case from the language of the contract, the evident intent of the parties, and all facts and circumstances under which the contract was made: *Kemp v. Knickerbocker*, 69 N. Y. 45.

An important matter for consideration, as bearing on the question, is whether the actual damages resulting from a failure to comply with the contract are definitely fixed by some rule of law, and may be easily determined and ascertained by the application of appropriate rules of evidence. If they are, and the sum named in the contract is greatly out of proportion to and much larger than the real damage, courts uniformly hold the stipulated sum a penalty, and require the party asserting injury to prove his actual loss. But where the actual damages are uncertain and difficult to ascertain or prove, are of a purely speculative character, and the contract furnishes no data for their ascertainment, the sum named and fixed by the parties for its breach is to be treated and held as liquidated damages: *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Chase v. Allen*, 13 Gray, 42; *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149. In such cases the parties are presumed to have taken the uncertain and speculative character of the damages into consideration in entering into their engagements, and to have agreed upon the definite sum for the purpose of putting the question beyond controversy and dispute: *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716. The inference of the law in all cases is that the parties intended to provide a reasonable remuneration for the failure of performance, and, in construing the provision fixing a definite and specific sum therefor, this fact must not be lost sight of. In cases where the sum stipulated is exceedingly large and greatly disproportionate to the real damages, and the actual damages may be readily ascertained, the law, in the interests of justice, reduces the parties to an equality, by compelling them to litigate their pecuniary difference on a basis of fair compensation;

and ⁵²⁸ this, too, without regard to the express language of the contract: *Horner v. Flintoff*, 9 Mees. & W. 678; *Yenner v. Hammond*, 36 Wis. 277; *Lampman v. Cochran*, 16 N. Y. 275; 1 *Sutherland on Damages*, 498; 13 *Am. & Eng. Ency. of Law*, 1st ed., 848, and cases cited there. It is not of controlling importance, where the actual damages are doubtful, speculative, and difficult of proof, that the amount stipulated is much larger than the apparent actual injury and loss: *Bagley v. Peddie*, 16 N. Y. 469, 69 *Am. Dec.* 713; *Hosmer v. True*, 19 *Barb.* 106; *Cushing v. Drew*, 97 *Mass.* 445. Such fact, however, is always to be considered, but is specially significant only in those cases where the damages may be readily ascertained by the application of definite and certain rules of law.

In the case at bar plaintiff represented to defendant that he had discovered or originated a plan by which the advertising for newspapers could be materially enlarged, and the parties dealt with each other on the theory and supposition that the proposed plan was one of substantial merit and worth in such matters. If the defendant wrongfully made use of it, as the evidence tends to show it did, we do not know what rule of law or evidence could be applied or adopted as a guide for ascertaining the damage plaintiff may have suffered, if the parties are not bound by the amount fixed and determined by the contract. Plaintiff was deprived of no tangible property, with definite or ascertainable value, but of a mere trade or business secret, of no known worth.

The case of *Bagley v. Peddie*, 16 N. Y. 469, 69 *Am. Dec.* 713, is, on principle, very similar to the case at bar. In that case it appeared that the bond there involved was conditioned for the payment of the sum of three thousand dollars, as liquidated damages for the failure to perform the covenants of a written agreement. The written agreement did not provide for a payment of money, or for the doing or omitting of any other act, the damages resulting from which could be ascertained from data furnished by the instrument itself, and the actual damages were uncertain and difficult to ascertain. One of the agreements alleged to have been violated was that the obligor should not reveal the secrets of a trade in which he was to be employed, or any invention or improvement that might be made by his employer. It was there held that the breach of this agreement ⁵²⁹ involved damages so uncertain and difficult to ascertain that the sum named in the bond should be deemed liquidated damages. That case was followed and applied in *Tode v. Gross*, 51

Hun, 644, 4 N. Y. Supp. 402. In the latter case defendant, a married woman, owned a factory for the manufacture of a certain kind of cheese, and sold it, together with the secret for its manufacture, to plaintiffs in the action, covenanting for herself and husband not to reveal or impart the secret to any other person; and it was held that for a violation of the contract the parties were liable for the penalty of five thousand dollars, as liquidated damages. This subject will be found very fully treated in 13 American and English Encyclopedia of Law, first edition, 847 et seq., where the authorities are collected, and many of them analyzed. Our conclusion on this branch of the case is that the sum stipulated in the contract must be treated as liquidated damages.

In view of another trial of the action, it is proper to place a construction upon the terms of the contract with respect to what particular advertising plaintiff is entitled to recover. The language of the contract is that if defendant makes use of the plan, either as submitted to it or in any modified form, it shall pay to plaintiff forty per cent of its gross receipts for all classified advertising run in its paper. The question naturally arises in this connection, whether the plaintiff is entitled to forty per cent of all advertising run in defendant's paper, without regard to whether such advertising was secured as the result of the use of plaintiff's plan. We construe this contract, in its immediate connection, to mean, and the parties, no doubt, contemplated and intended, that defendant should pay, as a remuneration for the use of the plan, a per cent upon the gross receipts of all advertising secured by it as a result of its use, and the plaintiff is entitled to recover a percentage only to the extent of the special benefits resulting therefrom. This is in harmony with the undoubted intention of the parties, and in consonance with the justice of the case. Plaintiff believed he had a plan which would materially advance the interests of defendant in the matter of procuring advertising, and defendant, in contracting with him, acted on the assumption that the use of his plan might result in substantial benefit. So, if the plan was made use of by defendant, as claimed ⁵³⁰ by plaintiff, and resulted in substantial and pecuniary benefit to it, a liability exists, to the extent of the compensation stipulated in the agreement, but not beyond the increased volume of business directly attributable to the use of the plan.

Order reversed.

Penalty or Liquidated Damages.—If damages are uncertain and insusceptible of ready ascertainment, and the sum fixed as damages is not unreasonable, it will be treated as liquidated damages; but if the damages are certain and susceptible of ready ascertainment, or if the sum fixed is out of all proportion to the probable damages, it will be treated as a penalty: See the monographic note to *Williams v. Vance*, 30 Am. Rep. 28; *Railroad v. Cabinet Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933, 58 S. W. 303; *Kunkel v. Wherry*, 189 Pa. St. 198, 69 Am. St. Rep. 802, and cross-reference note thereto, 42 Atl. 112. Consult, also, the monographic note to *Graham v. Bickham*, 1 Am. Dec. 331-340.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

LYNN v. HOCKADAY.

[162 Mo. 111, 61 S. W. 885.]

WITNESSES—HUSBAND AND WIFE.—In a controversy between distributees of an estate, the widow of the intestate is competent to testify to a contract by which her husband adopted one of such distributees as his child. (p. 487.)

ADOPTION.—AN ORAL CONTRACT for the adoption of a child, if fully performed by all of the parties, is valid, and not within the statute of frauds. (p. 488.)

ADOPTION—CONSIDERATION.—The fact that an adopted child takes the place of a daughter in the lives and home of her adopted parents is a sufficient consideration to support the contract of adoption. (p. 489.)

Wallace & Wallace and C. W. Sloan, for the appellant.

N. M. Givan and A. Glenn, for the respondents.

115 VALLIANT, J. This suit was for the admeasurement of dower of the widow of James Lynn, intestate, in which his son, James F. Lynn, claimed to be the only heir, but by leave Lillie Hockaday was made a party and filed an answer and cross-bill, showing that she was in fact the adopted daughter of the intestate, although no deed of adoption had been executed, and claiming a child's share in the estate. Issue was joined on the case made in her cross-bill, and upon the trial by the court there was a finding and decree against her, from which decree this appeal is taken.

The testimony on behalf of Lillie Hockaday showed that in 1875 she was an infant between three and four years old. Her name was then Julia Petty, both of her parents were dead,

and she was left to the care of her maternal grandmother, who was old and in poor circumstances, being herself dependent on her son for maintenance. She was the youngest of several children, who, at the death of their parents without any estate, were left dependent on relatives who were unable to provide comfortably for them.

At that time, James Lynn was a farmer in good circumstances, living on his farm with his wife, the widow in this case. They had been married about five years and had no child, but he had a son by a former marriage, James F. Lynn, who was the original plaintiff in this case, but who has died since the trial of the suit, and his heirs and administratrix have been substituted as parties.

Mr. and Mrs. Lynn, hearing of the little orphan, went together to the grandmother, who lived about eight miles from them, to see the child, and learn if the grandmother would give her to them. That was in March or April, 1875, and for just ¹¹⁶ what was said between the parties interested, on that visit, we have to depend upon the memory of Mrs. Lynn and Mrs. William Cook, an aunt of the child's, the grandmother and Mr. Lynn, the real parties to the alleged contract, both being dead.

When Mrs. Lynn was offered as a witness the plaintiff objected on the ground that she had been the wife of James Lynn, and for that reason was incompetent to testify in the case. The court overruled that objection, but on further objection ruled that she would not be allowed to testify to conversations with her husband when they were alone. The testimony as to the agreement was that when they went to see the grandmother they had a talk with her about the child, in which the grandmother told them that the child's mother on her death-bed had given the child to her, and that she was very dear to her, but to get the child a good home she would make a sacrifice of her own feelings; she said that she had had two or three opportunities to give her to parties to raise, but that was not what she wanted; she wanted some one to take the child and raise her for their own child, and where there were no other children. On these terms she would let her go. Mr. and Mrs. Lynn did not decide then to take her, but went home and considered the matter for several days, and after so considering it returned together to the grandmother, who gave the child to them, and they brought her home. Under the ruling of the court this witness was not permitted to testify as to what her husband said

to her on the subject. She was asked: "Q. When you were talking to Mrs. Cook [the grandmother], what did she say and how did she say she wanted a person to take her? A. Take her for their own child; to adopt her. Q. That is what she said herself? A. Yes, sir. Q. Did you all agree to that? A. Yes, sir; we agreed to it."

Upon cross-examination plaintiff showed this witness a letter which she acknowledged to have written, and which was ¹¹⁷ addressed to one of plaintiff's witnesses, Thomas Collins, asking him what he knew about the case, and soliciting his interest in behalf of the adopted child, appealing to him as an old friend of the family, etc. In the letter, she said: "You were the one who told us about the child. Advised us to take her and sent us to Grandma Cook's to see about it, which we did. Was pleased with the little child, and took her as our own. Mr. Lynn agreed to take her, adopt her as our own, as fairly as he ever did anything in his life. We were busy that summer and did not attend to having it recorded just then."

Mrs. William Cook was present when Mr. and Mrs. Lynn came to take the child, and she undertook to testify as to the agreement. But though she seemed to be an intelligent woman, she became confused in endeavoring to give the substance of the conversation, and was unable to understand the technical distinction between giving the substance of the conversation and drawing a conclusion therefrom. When asked to state the conversation she said it was so many years ago she could not remember the words that were used; then when asked to state the substance of the conversation she said that the substance was, the child was to be adopted. Upon motion of plaintiff that was ruled out as the statement of a conclusion. After being plied with like questions several times she seemed to grow a little impatient, for example: "Q. Now, can you give the exact conversation—if so, do so? A. No, sir; I cannot. Q. What was the substance of the conversation? Mr. Jarrott.—State what was said. The Court.—Take up what each one said, and tell as near what they said as you can. A. I cannot take up anything, for I do not remember it, and I am not going to do it either. . . . Q. I want you to give what you know about it; you were there? A. I have told you they were there, but I cannot tell you any of the conversation; only the agreement." The court ruled that that was a conclusion ¹¹⁸ and again told her not to state her conclusion, but to state the

substance, to which she replied: "A. I told you the run of the substance. Q. What was it? A. They were to adopt that child." The court again ruled that that was but a conclusion. There was a good deal of such examination and cross-examination, with the result as above indicated.

When the grandmother gave the child to Mr. and Mrs. Lynn, which was on their second visit, they took her home in their buggy, and, passing through the town of Pleasant Hill, called on Mrs. Shortridge, a friend of theirs. Mrs. Shortridge testified that when Mr. and Mrs. Lynn came in, Mrs. Lynn said: "See our little girl," and Mr. Lynn said that her grandmother had given her to them to raise as their own child. When they took her home Mr. and Mrs. Lynn immediately changed the child's name to Lillie Lynn, and thereafter she bore that name and none other until she was married. She was reared in the family of Mr. and Mrs. Lynn in all respects as if she was their own child, and she herself was taught to believe that they were her own father and mother, and she was never informed to the contrary until she was seventeen or eighteen years old. She addressed them as "papa" and "mamma" and they called her "daughter." A letter from Mr. Lynn to her when she was about thirteen years old was in evidence in which he addressed her as his dear daughter, and referred to Mrs. Lynn as her mother. She was as a dutiful loving daughter to both of them, and they were as kind and affectionate parents to her. She was never allowed to see her own brothers and sisters or any of her blood relations, or to know that she had any such. In the home circle, among neighbors, in school, in society, wherever she went, she was known as the daughter of Mr. and Mrs. Lynn, and she believed so herself until she was grown. She was married at home in the presence of both her adopted parents, with their approval, and she was married under the name of Lillie Lynn. There ¹¹⁹ was never any deed of adoption as the statute in such case provides.

Thomas Collins, a witness for plaintiff, the person to whom the letter of Mrs. Lynn above referred to was addressed, testified that he had known the parents of the child, that they had died very poor, leaving several children, who were placed in different homes, and the youngest, Julia, was left with her old grandmother, who the witness had heard wanted to get a home for her, and he tried to find her one, and told Mrs. Lynn about her. Mrs. Lynn came to his house and at her request he went

with her to the grandmother's. Mr. Lynn was not with them. "Q. You may state in substance what arrangements were made, if any, by Mrs. Lou A. Lynn and Mrs. Susan Cook, about Mrs. Lynn taking Julia Petty at the time that you went with Mrs. Lynn to see Susan Cook in the spring of 1875. A. We went there to see the old lady, Mrs. Cook, and she consented to give Mrs. Lynn the girl, Julia Petty; the girl was not in a condition to go home with Mrs. Lynn, and she was to go back in a few days. Q. You may state whether or not anything was said at that time by Mrs. Lynn about taking Julia Petty to adopt. A. The adopting part I heard nothing of, but Mrs. Cook gave her the child to keep as her own child. . . . She said that she wanted to take the child and raise her so that she would never know what her kinsfolk's name was."

The plaintiff's effort was to show that it was Mrs. Lynn, and not Mr. Lynn, who was responsible for taking the child from the grandmother, and to this purpose, in addition to the testimony of Collins, called Mrs. Wear as a witness, who testified in effect that Mrs. Lynn had said: "I went after Lillie and could not get her the first time; the second time I went after her I got her. Mrs. Cook told me when I was there the first time that I could not take her if she cried, but if she did not cry I could take her, and I took some trinkets along with me to please her, and she took up with me, and I brought her home, and that is all there is about it." Mrs. Frank Lynn and Mrs. Webster testified to similar conversations with Mrs. Lynn.

There was also testimony received, over the objection of defendant, to the effect that Mr. Lynn in his lifetime, at various times, but several years after he had taken the child into his family, had said in casual conversations, when asked about it, that he had not adopted her and was not going to do so; that that was his wife's affair, or words to that effect. But these statements were not made in the presence of the girl or of Mrs. Lynn. After hearing this evidence the court concluded that it was incompetent, and ruled it out.

Mrs. Lynn, in her testimony, had said that she first heard of the child through Mrs. Buckner, who informed her about it; the letter of Mrs. Lynn above mentioned was introduced to contradict her on that point. In the letter she said to Collins that he had first informed her. When shown the letter on cross-examination, she testified on that point: "That is a mistake, after I recalled it, he was not the first; we asked him something

about it; when I wrote that, I thought he was the first that told us about it; but he was not after I reflected over it a little." She had also testified that she never went to the grandmother's with Collins, but in this she was contradicted by Collins, who testified that he went there with her the first time, and a niece of his testified to the same effect. But whether she first heard of the child through Mrs. Buckner or Mr. Collins, and whether or not she first went to see the grandmother with Collins, the fact that she went twice with her husband and the second time they brought away the child with them, is supported by the testimony of several other witnesses, and is not in conflict with the testimony of Mr. Collins and his niece.

There was no conflict in the testimony as to the status of the child after she was brought into the family.

¹²¹ 1. It is insisted for respondents that the testimony of Mrs. Lynn was incompetent, and the argument is, that without her testimony there was no proof of a contract to adopt.

The objection to her testimony was in two forms—general and specific. The general objection, that she was incompetent to testify at all because she was the widow of the intestate, was overruled; the specific objection, that she could not testify to conversations with her husband when they were alone, was sustained, and she gave no such evidence. There were other specific objections to parts of her evidence which were sustained. But the testimony above quoted as to what the grandmother said in regard to the conditions upon which she would give them the child, and that Mr. and Mrs. Lynn agreed to those terms, was introduced without objection, unless it was covered by the general objection, going to the total incompetency of the witness. And the letter of Mrs. Lynn to Collins, in which she said that Mr. Lynn had agreed to adopt the child as fairly as he had ever agreed to anything in his life, was introduced by respondents on cross-examination. At the time Mrs. Lynn was first offered as a witness she had an answer on file in the case in which she had pleaded the adoption of the child by her husband and herself, and claimed to be entitled to a child's share of the real estate under section 4523 of the Revised Statutes of 1889, now section 2944 of the Revised Statutes of 1899, which provides that if the husband dies, leaving a child or children, the widow, if she has a child by such husband, may at her election take a child's share in lieu of dower. But in view of the objection to her as a

witness, under the advice of counsel, she withdrew that answer and elected to take only her dower.

Passing over the question of whether an adopted child fills the requirement of that statute, we see that by its terms the widow's right to a child's share depends on her election, and that election must be in writing in the form prescribed in the next ¹²² succeeding section, which it does not appear from the record was observed. Therefore, when she withdrew her answer, which had claimed a child's share on that account and in open court elected to take only her dower, she had then no interest in the controversy, even if she had ever had. But there was no objection made to her competency as a witness on the ground that she was a party in interest to the contract alleged to have been made by the deceased, but it was only on the ground that she was the wife of the deceased, and the argument in the brief of counsel is that she was disqualified by the terms of the proviso, in section 8922 of the Revised Statutes of 1889, now section 4656 of the Revised Statutes of 1899. That section declares that no married woman shall be disqualified as a witness in a civil suit prosecuted in the name of or against her husband in certain cases, and specifies the cases, but this is not one of them. Then it adds: "Provided, that nothing in this section shall be construed to authorize or prevent any married woman, while the relation exists, or subsequently, to testify to any admission or conversations of her husband, whether made to herself or to third parties." That proviso by its very terms is only a restriction of the right in that section conferred. The section enables a married woman to testify in certain kinds of cases in which by the common law she was disqualified, but having qualified her as a witness in those cases, it adds, in effect, that in exercising the right there conferred she is not to speak of what her husband may have said to her or to anyone else. It is, on the whole, an enabling and not a disabling statute: *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120. The restriction in the proviso is not on a capacity she had before, but only on the privilege there conferred. At common law, in a suit between strangers, in which neither the interest of herself nor that of her husband was affected, she was a competent witness to testify to a conversation between her husband and a third person: ¹²³ 1 Greenleaf on Evidence, 16th ed., secs. 341, 342. Such a case would not come within the purview of that statute.

In *Moore v. Wingate*, 53 Mo. 398, 409, concerning the proviso now under discussion, it was said: "This provision of the statute was intended to apply to all cases, whether the husband was a party to the action or not." The language is broader there than necessary; it would have been sufficient if it said that the provision applied to the facts of that case. And perhaps all that was there intended was that it applied as well to a case in which her husband or his estate was interested as it did to a case in which he was a party. That it was not intended to construe the statute as imposing a new disqualification on a wife is shown by the words immediately following: "It was intended to leave the disabilities of a married woman, in reference to these matters, just as they were at common law."

In *Holman v. Bachus*, 73 Mo. 49, a similar broad expression is found, but the same idea prevails through the opinion, that the statute only dealt with existing common-law disabilities. In that case the estate of deceased husband, though not sued, was interested. There is nothing in *Willis v. Gammill*, 67 Mo. 730, *McFadin v. Catron*, 120 Mo. 253, 25 S. W. 506, or *Shanklin v. McCracken*, 140 Mo. 356, 41 S. W. 898, to which we are referred, contrary to this view. If, therefore, Mrs. Lynn was not disqualified at common law, she was not disqualified by the statute.

In *Spradling v. Conway*, 51 Mo. 51, it was held that where it was simply a controversy between distributees of the estate, the widow of the intestate was not disqualified at common law, and was a competent witness to testify to what her husband said to third parties. This was followed by our St. Louis court of appeals, in an opinion by Thompson, J., in *Hoyt v. Davis*, 30 Mo. App. 309, 314, and is in harmony with the reasoning in *Garvin v. Williams*, 50 Mo. 206.

¹²⁴ The case at bar presents no claim against the estate of the deceased; it is simply a question between parties claiming to be heirs at law of the intestate, and affects only the partition of the estate between them; the estate itself is not to be augmented or diminished by the result. Suppose, instead of a question of adoption, it was a question of identification of one claiming to be an heir; could there be any doubt that the widow would be a competent witness? If so, then the court committed no error in overruling the general objection that went to the entire exclusion of the witness. Nor did the court commit error in receiving the testimony that was given by Mrs. Lynn relating to

what passed between the grandmother and her husband and herself, even if there had been specific objection to that, which was not the case. All there was of her testimony was to the effect that when she and her husband first went for the child, the grandmother stated the terms on which she would let her go. They returned home to consider the proposition, and in a few days returned and bore the child away. The nearest she came to stating what her husband said, was "we agreed to it," and her testimony would have been in all things as effective if that had been omitted. It was a case in which acts spoke louder than words. All the subsequent acts of Mr. Lynn were not only consistent with the theory of adoption, but were inconsistent with any other theory, and those acts testify to what the agreement was more surely than witnesses who attempt to repeat the substance of conversations which they listened to twenty years before.

To Mrs. Shortridge, Mr. Lynn said, on the day he received the child, and while he was on the way carrying her to his house, that the grandmother had given her to them to raise as their own child. Even Mr. Collins, the chief witness for respondents, said: "The adopting part I heard nothing of, but Mrs. Cook gave her the child to keep as her own child."

¹²⁵ When we consider who the old grandmother who dictated the terms was, and her condition in life, we cannot expect her to have been posted as to the technical requirements of the statute, in regard to adoption, but we see that she did understand the difference between merely giving the child out to service or to rear, and giving her to one who would take her for his own child. Her words were as descriptive of the condition as if she had used the technical word "adoption."

2. The main argument in resistance to the claim of adoption is that the agreement relied on is within the statute of frauds, and there being no deed of adoption, the claim fails. The agreement is not, strictly speaking, within the statute of frauds; that is, it is not embraced within the provisions of the ancient statute of frauds: Browne on Statute on Frauds, secs. 275-276a; Rodgers on Domestic Relations, sec. 459. Yet it bears a resemblance to cases within that statute, for the reason that the statute authorizing the adopting of a child provides that it may be done by deed in writing, and indicates no other method. And as there was no common-law adoption, the argument is that it must be done as the statute requires, or it cannot be done at

all. But since the statute has made the adoption of a child lawful, the law, for the same reasons that it sometimes enforces oral contracts affecting real estate, will not allow the mere failure of one party to do his duty to work an irreparable wrong to one who has fully performed his part. This court, for that reason, has not only held an oral contract for adoption valid, but has also required fulfillment of a collateral agreement of the adopting parent, to leave the adopted child his estate at his death: *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107.

Under the evidence in this case we cannot shut out from our minds the conviction that Mr. and Mrs. Lynn both agreed with the grandmother to adopt this child, that on the faith of that agreement the child was given to them, and thus the agreement¹²⁶ was performed on the part of the grandmother, and that it has been fully performed on the part of both the adopting parents and the adopted child, save only the deed has not been executed, and that was through no fault of the child's. The life of that whole family in reference to this child, from the time she was first taken into it until the death of Mr. Lynn, would have to be construed to be a deception and a fraud, if we would give to it the effect that respondents claim for it. It is argued that her relatives were poor, and that she has had, in the family of Mr. Lynn, a better home and more refined rearing than she would have had if he had not taken her. That may be; but it does not follow as a legal conclusion that the reward was all on her side, or even that it was her gain at all. That she took the place of an only daughter in the lives of Mr. and Mrs. Lynn, and performed her part as such, is the cold fact which the law regards as sufficient consideration to support the contract. How much she added to their happiness the law does not undertake to estimate. What her life would have been if it had been left to flow on in the channel that nature had given her, whether happier and better, or the contrary, no one can tell. But the evidence shows that by no will of hers, and not primarily for her pleasure, she was taken away from her own relatives, and was as completely deprived of the affection that comes from natural family ties as if nature had provided her none. Who can estimate the value of that of which she was deprived? And who can say she was compensated by what she received? Taken at an age when she was too young to know who she was, advantage was taken of her very helplessness in that respect, her

mind was obscured to the truth and forced to believe in the fictitious condition. She was taken possession of, mind and body, and molded as her adopted parents desired. Like a bud that has been cut from its natural stem and grafted into a foreign tree, she grew into ¹²⁷ the family and became a part of its very life. Everything that adoption contemplates was accomplished. It became a contract, fully performed on her part, and the statute of frauds cannot be invoked to her injury.

The judgment of the circuit court is reversed, and the cause remanded to the court, with directions to enter a decree upon the issues made by the cross-bill, declaring Lillie Hockaday a duly adopted child and heir at law of James Lynn, deceased, and as such entitled to a child's share of his estate.

All concur, except Marshall, J., absent.

The Law of Adoption of Children is considered in the monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210-231. Another's child cannot be adopted except pursuant to the decree of a competent court, made in conformity with the statute: *Non-she-po v. Wa-win-ta*, 87 Or. 213, 82 Am. St. Rep. 749, 62 Pac. 15. But see contra the principal case, ante, p. 480. It has been held that the statute of frauds has no application, where the adopted child has performed the contract on her part: *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107.

BAKER v. CUNNINGHAM.

[162 Mo. 134, 62 S. W. 445.]

MORTGAGEE IN POSSESSION—ACCOUNTING.—A mortgagee in possession is in equity accountable for the rents and profits, and is bound to apply them in reduction of the mortgage debt, but, on an accounting, is entitled to be reimbursed for taxes paid, necessary repairs made upon the premises, and interest on the debt up to the time of foreclosure; and if the entire debt is not then paid, the deed made upon foreclosure cannot be set aside by the mortgagor's heirs. (pp. 493, 495.)

MORTGAGES — FORECLOSURE. — MISTAKE of three years as to the date of sale in an advertisement of foreclosure sale is immaterial, and no ground for setting the sale aside, if the advertisement correctly describes the parties to the mortgage, where it is recorded and so identifies it that no one can be misled. (p. 495.)

MORTGAGES—FORECLOSURE—SETTING ASIDE SALE — LACHES.—If, after foreclosure and sale of the mortgaged premises and ouster under unlawful detainer against the mortgagor,

they set up no claim that the debt has been paid until more than two years thereafter, and after the death of the mortgagor, they are guilty of such gross laches as bars their right to set aside the foreclosure sale and the deed made thereunder. (p. 496.)

J. W. Suddath, for the appellants.

C. E. Morrow, for the respondents.

¹³⁷ MARSHALL, J. This is a suit in equity to cancel a trustee's deed and to revest title in the plaintiffs. The plaintiff, Sarah E. Baker, was formerly the wife of Alexander McCausland, and is now the wife of William Baker, and a daughter and one of the devisees under the will of James F. Cunningham, and her coplaintiffs are her children begotten of her marriage with Alexander McCausland, and the defendants are the widow and other children of James F. Cunningham, and his executor and the other legatees under his will.

The facts are these: On the twentieth day of March, 1871, Alexander McCausland was the owner of the southeast quarter of the southwest quarter of section 24, township 45, range 29, containing forty acres, and of an undivided one-half interest in fifteen acres off of the south end of the east half of the southeast quarter of the same section, township, and range in Johnson county. On that day he executed his negotiable promissory note for three hundred and ninety dollars to the order of David Davenport, payable twelve months after date, with ten per cent interest after maturity, and secured the same by a deed of trust on the said land, naming Francis M. Cockrell as trustee. When the note fell due, McCausland was unable to pay it, or any part of it, and so the matter stood up to 1874 or 1875. At that time, John Newton had acquired the note and deed of trust, and was threatening to foreclose. McCausland induced his father in law, James ¹³⁸ F. Cunningham, to purchase the note from Newton. McCausland went west and joined a surveying party, which was lost, and the last that was heard from him was in June, 1879. Cunningham entered into possession of the land when McCausland left, and rented it and controlled it thereafter. From 1875 to 1877 the property was worked by Mage Cunningham. In 1877 it was rented to John R. White. In 1879 and 1880 it was rented to Glover. From 1880 to 1884 it was rented to Robinson & Seamonds. From 1884 to 1894 Mrs. McCausland and her children occupied it. The defendants' evidence tends to prove that they paid no rent from 1884 to 1890, and that from 1890 to 1894 they paid an average of

thirty dollars a year rent. In 1894 they refused to pay any more rent, and Cunningham caused the deed of trust to be foreclosed, and received a trustee's deed therefor, which is the deed sought to be canceled. Cunningham then instituted unlawful detainer proceedings against the McCauslands and ejected them from the premises. Cunningham died in May, 1896, and this suit was begun on the 7th of August, 1896. Cunningham paid the back taxes on the land for the years 1870 to 1873, inclusive, amounting to \$288.35, and after he took possession in 1874 he paid the taxes and repairs until he died, amounting, according to defendants' evidence, to \$289.94, and according to the plaintiff's evidence, to \$230.62. The plaintiff introduced testimony tending to show that the land would reasonably rent for \$2.50 an acre a year, and that Cunningham swore in the unlawful detainer case that he had collected on an average of \$100 a year rent; also evidence tending to show that while the McCauslands occupied it they set apart one-third of the crop each year for Cunningham's rent, and that the land would yield fifteen bushels of wheat a year, worth eighty cents a bushel, and twenty-five bushels of corn, worth twenty-five ¹³⁰ cents a bushel, and that the neighbors had seen the McCausland boys hauling corn in the direction of Cunningham's house during years from 1884 to 1894; also evidence tending to show that for the year 1879 Cunningham received \$80 rent for the place from Cook, and for the year 1880, he received \$100 from Cook (other witnesses testified that for the years 1879 and 1880 the place was rented to a man named Glover). The petition charges that Cunningham collected \$100 a year rent from 1877 to 1884, and that from 1884 to 1893, inclusive, the plaintiffs occupied the land as tenants of said Cunningham and paid him in wheat, flax, corn, and oats, "the exact amounts for each year being unknown, but of the reasonable value of \$100 per year."

The plaintiffs predicate their right to relief on two grounds: 1. That in the trustee's advertisement the deed of trust was described as having been executed in 1874, whereas, in fact, it was executed in 1871; 2. That Cunningham entered into possession of the property under an agreement with McCausland that he would apply the rents, issues, and profits upon the debt, and that before the foreclosure such rents, issues, and profits amounted to more than enough to pay off and discharge the debt, and hence the sale under the deed of trust was unauthorized and conveyed no title, and the plaintiffs prayed for an accounting, for a cancellation of the trustee's deed to Cunning-

ham, and for a judgment over for \$1,050 against the estate of Cunningham. The defendants, on the contrary, claim that Cunningham only received rent from the place from other parties for two years, and from the plaintiffs for four years, and that, after deducting the rents so received, there was due Cunningham at the time of the foreclosure, for principal and interest and taxes paid by him, the sum of \$1,736.73. The trial court decided the first contention against the plaintiffs, but sustained the second, and ¹⁴⁰ found that James F. Cunningham, prior to the foreclosure, received from the rents, issues, and profits, under an agreement to apply them upon the payment of the debt, an amount more than sufficient to pay off the debt, interest, and taxes, and, therefore, entered a decree canceling the trustee's deed and revesting the property in the plaintiffs. The court did not state the account, but made a finding as stated. After proper steps the defendants perfected this appeal.

1. The petition charges that Cunningham was let into possession in 1875 by McCausland, under an agreement that he would apply the rents, issues, and profits to the payment of the mortgage, and an accounting is prayed.

The general rule of law is, that "a mortgagee in possession, whether in person, by trustee, receiver, or by tenant, is in equity accountable for the rents and profits of the estate, and is bound to apply them in reduction of the mortgage debt. After paying the interest of the debt, any balance of receipts is applicable to reduce the principal. The mortgagee is not allowed to make a profit out of his possession of the estate. Therefore, upon a redemption of the mortgaged premises by anyone interested in them, he is obliged to state an account of his receipts from the mortgaged property, and he is entitled to allowances for all proper disbursements made by him in respect of the premises": 2 Jones on Mortgages, 5th ed., sec. 1114; *Hannah v. Davis*, 112 Mo. 599, 20 S. W. 686; *Stevenson v. Edwards*, 98 Mo. 622, 12 S. W. 255; *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62, 7 S. W. 570.

The mortgagee will not be held accountable for more than the rents actually received unless he has been guilty of fraud ¹⁴¹ or negligence: *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62, 7 S. W. 570; *Stevenson v. Edwards*, 98 Mo. 622, 12 S. W. 255.

"The mortgagee in possession takes the rents and profits in a quasi character of trustee or bailiff of the mortgagor. In equity he must apply them as an equitable setoff to the amount

due on the mortgage. Such a receipt is not a legal satisfaction of the mortgage. There is no payment and satisfaction of the mortgage until the rents and profits are applied to the payment of the debt": 2 Jones on Mortgages, 5th ed., sec. 1115.

"The mortgagor's right to hold the mortgagee to account for rents and profits of the mortgaged premises, or for waste done to them, must be enforced in equity and not by suit at law. Though the rents received may be sufficient to satisfy the debt in full, the only remedy of the mortgagor is by a bill in equity for an account and redemption": 2 Jones on Mortgages, 5th ed., sec. 1116.

Of course, the mortgagee in possession, upon such an accounting is also entitled to be reimbursed for taxes paid and for necessary repairs made upon the premises: *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519.

Applying these rules to case at bar the result is, that it appears that Cunningham received \$80 rent for the year 1879, \$100 for the year 1880, some wheat, corn, etc., during the years the plaintiffs occupied the premises from 1884 to 1893, but the petition states that such amount is unknown to the plaintiffs and the testimony is equally vague and uncertain as to the amount, but the defendants say it amounted to \$30 a year for the years 1890 to 1893, inclusive. It appears from 1875 to 1879 the place was worked by or rented to Mage Cunningham, John White, and Glover, but how much they paid is not disclosed, and that from 1880 to 1884 it was rented to Robinson and Seamonds, but it is not shown how ¹⁴² much they paid. The trial court did not state any account, but found generally that Cunningham received more than enough to pay the debt, and hence the mortgage was paid when it was foreclosed. We are not advised how the court reached this conclusion. The evidence of the rents received is wholly insufficient to afford data enough to intelligently state an account thereof. The known factors for such a computation are these: The debt secured was \$390; the interest was \$39 a year, which from 1875, the date Cunningham took possession, up to 1894, the date of the foreclosure of the deed of trust, amounts to \$831; Cunningham paid the back taxes from 1870 to 1873, inclusive, amounting to \$288.35, and the taxes thereafter amounting, according to the plaintiff's computation, to \$230.62, aggregating \$1,739.93. On the other hand, Cunningham received \$80 rent for the year 1879, \$100 for the year 1880, and wheat, corn, etc., for an amount not shown by the plaintiffs, but shown by the defendants to equal \$30 a year for four years,

making \$120 during the ten years the plaintiffs occupied the land, aggregating \$300. Plaintiffs introduced evidence tending to show that the land would reasonably rent for \$100 a year, and also declarations of Cunningham that it yielded him that much rent a year. Give effect to this and charge him with rent at \$100 a year for the years 1875 to 1879, and from 1880 to 1884, making eight years, and add this \$800 to the \$300 he is shown to have received for the years 1879 and 1880, when Cook is said to have paid it, and the years 1884 to 1894, while the plaintiffs occupied it, and it shows a total amount of \$1,100 received by Cunningham. This is \$639.93 less than the debt, interest, and taxes due to him at the date of the foreclosure. This is as close to a mathematical statement of the account as the evidence warrants. There appears, therefore, to have been a balance due Cunningham of \$639.93 at the date of the foreclosure, ¹⁴³ and if this is true, the debt was not paid, and Cunningham had a right to foreclose the deed of trust, and acquired a good title to the land, for the rents, issues, and profits thereafter arising belonged to him as owner and not as mortgagee.

Evidence of loose statements of Cunningham that he received \$100 a year are very unsatisfactory at best, and when such statements come after Cunningham is dead, and therefore it is not possible to controvert the evidence that such statements were in fact made, they are received with great caution by a court, and cannot be allowed to overcome the direct evidence that he did not receive that amount per year during 1879, or during the years 1884 to 1894 while the plaintiffs occupied the premises. The facts proved did not, therefore, justify the finding of the trial court that the rents collected had extinguished the debt when the deed of trust was foreclosed, and the trial court erred in so holding and in canceling the trustee's deed to Cunningham and in revesting the property in the plaintiffs.

The trial court properly held that the statement in the trustee's advertisement, that the deed of trust was made in 1874, when, in fact, it was made in 1871, did not mislead the plaintiffs, or anyone else, and therefore it was immaterial. The immateriality in this error of date is made more manifest when it is remembered that the trustee's notice described the deed of trust as having been made by Alexander McCausland and Sarah E., his wife, and stated that it was recorded in book D, at page 562, of the records of Johnson county. This identified the deed of trust intended to be foreclosed, and it is the only deed of trust

on this land which the evidence shows Alexander McCausland and Sarah E., his wife, ever made.

¹⁴⁴ 2. There is another reason for refusing the relief asked by the plaintiffs. They have been guilty of such gross laches that they have no standing in a court of chancery. If their averments are true, they knew when the deed of trust was foreclosed that the debt was extinguished and the deed of trust was satisfied. But they stood quietly by and permitted the deed of trust to be foreclosed, and the land to be sold. Afterward, they were sued in unlawful detainer for the possession of the land and judgment went against them. Yet they took no steps to protect their rights, even in times of dire extremity. On the contrary, they never set up the claim that the debt was paid until more than two years after all these matters had occurred, and after Cunningham's lips were sealed in death. As long as he whose duty it was to account, who knew how much he had received, who alone could deny or disprove the testimony ascribing loose declarations to him, was alive, these plaintiffs remained quiet and asserted no claim. But before the grass was green over his grave, they rush into a court of equity with this suit against the mother and sisters and brothers of the plaintiff, Sarah E. Baker. They remained perfectly acquiescent and passive until the father had died, took advantage of legacies and bequests to them in his will, and then instituted this suit. There is no equity in such a claim. As was well said in *State v. West*, 68 Mo. 232: "A court of equity does not lend a helping hand but to the prompt and vigilant. Here the fact of Burros' purchase was known to the county court within a short time after it occurred, and yet no complaint was made or suit instituted until months afterward, when Burros' lips were sealed in death. Under such circumstances, the laches must, of itself, be held fatal, for it would be to assert a doctrine to the last ¹⁴⁵ degree hazardous to say that a complainant, with full knowledge of all the facts on which he relies, can lie quietly by until death comes to his assistance and puts the seal of perpetual silence upon the lips of his adversary."

In *Smith v. Clay*, Amb. 645, Lord Camden said: "A court of equity, which is never active in relief against conscience or public convenience has always refused its aid to stale demands where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches

and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

If plaintiff's claim of an overpayment of \$1,050 is true, then the debt was paid in 1884, when they entered into the possession of the premises; yet they occupied the premises for ten years thereafter, and if they are correct in their theory, they paid rent at the rate of \$100 a year for ten years for land which of right was theirs, discharged of the mortgage from the moment their possession began. They offer no excuse for not asserting their claim during all that time. They do not come into a court of equity with clean hands, and are not entitled to its aid.

The judgment of the circuit court is reversed.

All concur.

In the Case of *Smith v. Boyd*, 162 Mo. 146, 62 S. W. 439, it was decided that if a new note and deed of trust are given in the place of former ones, under agreement that they are to be canceled and released of record, all persons who have actual knowledge of such agreement are estopped from asserting title under the deed of trust, although it is not released of record. Such agreement does not, however, amount to a payment of the note, and if such deed of trust is foreclosed and the property purchased by one who has notice of such agreement, and by him conveyed to an innocent purchaser without notice, who purchases on the strength of the fact that the record shows that such deed of trust is a first lien, he cannot be charged with fraud, but takes the title to the exclusion of another person who purchases under the second deed of trust upon the assurance of the owner of the first note that the second deed of trust is the first lien.

In *Curtis v. Moore*, 162 Mo. 442, 63 S. W. 80, the court decided: 1. That if a debt secured by deed of trust is not fully paid before foreclosure, the trustee's deed thereunder conveys a good title to the purchaser; 2. That if an attempt is made by the widow of the mortgagor to set aside a trustee's deed under foreclosure sale, on the ground that the debt had been fully paid prior to such sale, it is necessary for her, in order to establish a resulting trust in the land, to show that it was paid for with her money, although at the time of the purchase it was deeded to her husband; 3. If a mortgagor, at the time the property is sold by the trustee under foreclosure, requests that the sale be made, directs the method of sale, accepts the proceeds, and subsequently pays rent to the purchaser for the use of the land, he is estopped from questioning the validity of the sale on the ground that the mortgage debt was fully paid at the time of the trustee's sale.

A Mortgagee in Possession is liable to account for rents and profits, less such sums as he may have paid out for taxes and necessary repairs and improvements: Note to Caldwell v. Hall, 4 Am. St. Rep. 70. See, also, in this connection, Long v. Richards, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083; Mahoney v. Bostwick, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; Robertson v. Read, 52 Ark. 381, 20 Am. St. Rep. 188, 14 S. W. 387.

To Entitle a Mortgagor to Disaffirm a Sale under foreclosure, he must exercise his right within a reasonable time. On obtaining knowledge of irregularities in the sale, he must promptly take steps to have it set aside, or a ratification by him will be implied: Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Southard v. Perry, 21 Iowa, 488, 89 Am. Dec. 587.

STATE v. MILLER.

[162 Mo. 253, 62 S. W. 692.]

CRIMINAL LAW—CAPACITY OF WIFE TO COMMIT CRIME—COERCION OF HUSBAND—PRESUMPTION.—If a wife, at the instigation and request of her husband, procures a revolver and takes it to him in jail, where he is confined, for the purpose of assisting him to escape, and he actively participates with her in conveying the revolver into the jail, it must be presumed that she acts under his direction and coercion, and she is entitled to acquittal of any charge brought against her for the commission of such act unless such presumption is rebutted. (p. 501.)

J. W. Stokes and G. W. Murphy, for the appellant.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

256 GANTT, J. The defendant was indicted in the circuit court of Holt county, Missouri, at the August term, 1900, for feloniously conveying a revolver into the county jail of Holt county, which pistol, it was alleged, was useful to aid prisoners to escape out of, and from, said jail; the said Jane Miller then and there intending, feloniously, to aid, assist, and facilitate the escape of David Miller, who was lawfully committed and detained in said jail according to law, having been convicted of murder in the first degree. Defendant was duly arraigned and pleaded not guilty to the charge in the indictment.

The indictment is founded upon section 2061 of the Revised Statutes of 1899, and is sufficient, under former adjudications of this court: State v. Addcock, 65 Mo. 590; State v. Pinnell, 93 Mo. 480, 6 S. W. 221.

The evidence established that the defendant was and is the wife of David Miller. At the November term, 1899, of the Holt circuit court, David Miller was convicted of murder in the first degree and appealed from the sentence to this court, and on the date of the offense charged against defendant in this cause was incarcerated in the Holt county jail awaiting the result of his appeal.

It conclusively appeared that the defendant conveyed to her husband in said county jail a revolver. Her explanation was that she often visited her husband during his imprisonment, and he informed her that it was rumored that he would be mobbed, and he requested her to get him a pistol to defend himself in case he was attacked by a mob.

She got the revolver from her brother and took it to her ²⁵⁷ husband at his request, and acted throughout the matter entirely under his direction and influence.

The defendant prayed the court for a peremptory instruction of not guilty, which the court refused. Thereupon the court gave the following instructions:

"1. The court instructs the jury that the defendant is presumed to be innocent of the offense charged. Before you can convict her, the state must overcome that presumption by proving her guilty beyond a reasonable doubt. If you have a reasonable doubt of the defendant's guilt, you will acquit her. But a doubt, to authorize an acquittal, must be a substantial doubt, founded on the evidence, and not a mere possibility of her innocence.

"2. The court instructs the jury that the defendant is a competent witness on her own behalf, and that you should not reject her testimony merely because she is the defendant. But the fact that she is the defendant, testifying in her own behalf, should be taken into consideration by you in determining what weight you will give to her testimony.

"3. The court instructs the jury that you are the sole judges of the credibility of the witnesses and the weight of their testimony. In determining such weight and credibility, you will take into consideration the character of the witness, his manner on the stand, his interest, if any, in the result of the trial, his relation to or feelings toward the defendant, the probability or improbability of his statements, as well as all the facts and circumstances given in evidence. In this connection you are further instructed that, if you shall believe that any witness has know-

ingly sworn falsely to any material fact, you are at liberty to reject all or any portion of such witness' testimony.

"4. The court instructs the jury that if you believe from ²⁵⁸ the evidence beyond a reasonable doubt that the defendant, Jane Miller, at the county of Holt and state of Missouri, at any time within three years next before the twenty-eighth day of August, 1900, conveyed a pistol into the county jail of Holt county, and that the said Jane Miller then and there intended, in so doing, to aid, assist, and facilitate the escape of David Miller out of said jail, you will find the defendant guilty and fix her punishment at imprisonment in the penitentiary for not less than two nor more than ten years, unless the jury further find that the defendant, at the time of the conveying of the pistol into the jail, was in the presence of her husband, David Miller, and acted under the coercion of her said husband, as defined in instruction No. 5 of this case.

"5. The court instructs the jury that the evidence in this cause is sufficient to show that defendant, at the time of the alleged commission of the crime, was a married woman, and the wife of David Miller, and that, even though you may believe from the evidence that the defendant committed the crime charged in the indictment, yet, if you further believe that she committed the crime in the presence of her husband, David Miller, and that he was present at the time when she delivered into the jail the revolver mentioned in the indictment to David Miller, then the law, in the absence of other and further culpatory and explanatory evidence against the defendant herself, presumes that she acted under the immediate coercion of her husband, and, in such case, you will find the defendant not guilty.

"This presumption of law, however, that the wife acting in the presence of her husband is acting by coercion, and that she is, therefore, not guilty of a crime committed in his presence. is prima facie only, and may be rebutted by other and further evidence in the case, and if, in this case, you believe from all the testimony before you that the defendant was the ²⁵⁹ sole acting party and committed the crime, as charged, without any incitement on the part of her husband, or that the defendant was the sole instigator of the crime and did the same as charged in the indictment, then you will find the defendant guilty, even though you believe that her husband was present when she committed the act.

"6. The court instructs the jury that the indictment in this case is a formal charge against the defendant and should not be taken into consideration in determining the guilt or innocence of defendant."

Thereupon counsel for defendant requested the court to give the following instruction on behalf of the defendant, which the court refused to give. To the refusal of the court to give said instruction, the defendant then and there excepted and still excepts.

"The court instructs the jury that, if they believe from the evidence that defendant, Jane Miller, was at the time of the alleged offense the wife of one David Miller, mentioned in the indictment, and that she, being in his presence, was requested by him to procure for him the pistol mentioned in the evidence, then the law presumes that she acted under his influence and duress, and, although you may believe that she afterward did so furnish said pistol to her husband, the jury will find defendant not guilty."

Marriage does not take from the wife her general capacity to commit crime, but as it casts upon her duty of obedience to and affection for her husband, the law indulges a presumption that if she commits an offense in his presence, it was the result of his constraint or coercion, and in the absence of proof to the contrary excuses her: 1 Bishop's New Criminal Law, sec. 357. This presumption is not a conclusive one, but is rebuttable: *State v. Ma Foo*, 110 Mo. 7, 33 Am. St. Rep. 416, 19 S. W. 222.

In *State v. Ma Foo*, "by her own evidence the wife exonerated²⁰⁰ her husband of all complicity in the crime," and so did the other testimony, and we ruled that she was responsible for her own acts and the presumption was rebutted.

In this case the evidence shows that the wife, at the instigation of her husband, procured a revolver and took it to him in the county jail. No witness contradicts this, but the physical facts corroborate her evidence that he at least was present at the culmination of the offense, and actively participating with her in conveying the revolver into the jail. Under the circumstances, did she commit the offense in his presence?

Mr. Bishop in his *New Criminal Law*, volume 1, section 359, says: "An act not begun in the husband's presence is within the rule if completed in it. Thus, where a wife conveyed to her husband in prison, by his direction, an implement for escape, she was deemed to have acted under his coercion, therefore entitled to acquittal": Citing *Rex v. Knight*, 1 Car. & P. 116.

"Here she was present while delivering the thing to him, but absent while procuring and conveying it."

We think it must be held that the husband was present when the offense was committed, and, being so, the fact that he was at the time incarcerated in jail awaiting the result of his appeal will not rebut the presumption of coercion.

The all-important question remaining for decision is, Was there any evidence upon which to send the case to the jury? Was there any evidence to rebut the presumption arising out of his presence with her when she gave him the revolver? If there was, instruction numbered 5 unquestionably declared the law correctly, but it seems to us there was no evidence which rebutted the presumption. In all she did she but yielded obedience to the will and direction of her husband, and the act itself, which the statute denounces and makes criminal, was only completed in his presence and by handing him the revolver ²⁶¹ which he required her to bring him.

It seems to us she was in no sense the independent inciter and mover in the crime, and if ever a case can be made in which the law will indulge the presumption in a wife's favor, this is the one.

The circuit court should have given defendant's first instruction and directed an acquittal. The second instruction for the state is erroneous in form. A similar instruction was disapproved in *State v. Austin*, 113 Mo. 538, 21 S. W. 31.

The judgment is reversed.

Sherwood, P. J., and Burgess, J., concur.

If a Wife Commits a Minor Felony or misdemeanor in her husband's presence, it is presumed that she did it under constraint by him, and she is therefore excused. But this presumption is merely *prima facie* and is rebuttable. The presumption of marital coercion does not arise in case of the graver felonies: See the monographic note to *Bibb v. State*, 33 Am. St. Rep. 92-94; *State v. Ma Foo*, 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222.

MOHR v. LANGAN.

[162 Mo. 474, 63 S. W. 409.]

REPLEVIN—PROPERTY IN CUSTODY OF LAW.—Goods placed in the hands of the plaintiff under a writ of replevin are, as to him, his grantees and privies, in custodia legis until the determination of the action, and cannot be sold by the party in possession or levied upon by either party or their privies. (p. 513.)

REPLEVIN—CUSTODY OF LAW AS TO THIRD PARTIES.—The pendency of a replevin suit does not place the property in contest in the custody of the law, and does not bar their right to proceed against it by proper judicial process to establish their rights. (p. 514.)

BAILMENTS—CONVERSION.—A bailee who, having notice of the rights of the real owner, aids and abets the bailor in wrongfully converting the goods is liable for their conversion. (p. 514.)

REPLEVIN—BAILMENT—CONVERSION—CUSTODY OF LAW.—If goods are placed in the hands of the plaintiff under a writ of replevin and by him placed with a warehouseman for safe-keeping, and by the latter, under an order from plaintiff, delivered to an auctioneer, who sells them, and they are afterward adjudged to be the property of the defendant in replevin, both the warehouseman and the auctioneer are liable for a conversion of the goods, regardless of their knowledge as to their ownership. (pp. 515, 520.)

Kinealy & Kinealy and S. Barclay, for the appellant.

R. J. Delmo and O. J. & R. L. Mudd, for the respondent.

⁴⁷⁹ **MARSHALL, J.** In June, 1894, a Mrs. Smith replevied certain household goods from the plaintiff herein, Mrs. Mohr, claiming title thereto under a mortgage thereon executed by Mrs. Mohr. Mrs. Smith obtained possession of the property under the writ of replevin. Before a justice of the peace, Mrs. Smith secured a judgment. Mrs. Mohr appealed to the circuit court, where upon a trial de novo, on March 4, 1895, judgment was rendered in favor of Mrs. Mohr for a return of the property replevied, or its assessed value of three hundred and fifty dollars, at the option of Mrs. Mohr. After Mrs. Smith obtained possession of the goods she stored them with the defendant, Langan, a regularly licensed warehouseman, and they remained stored until March 20, 1895, and hence were intact on March 4, 1895, when the judgment of the circuit ⁴⁸⁰ court was so rendered in favor of Mrs. Mohr. On March 20, 1895, Mrs. Smith procured defendant Langan to de-

liver the goods to defendant Leonori, a regularly licensed auctioneer, and on March 26, 1895, Leonori, by direction of Mrs. Smith, sold the goods at auction, and turned over the proceeds, one hundred and fourteen dollars and eighty cents, to Mrs. Smith. Defendant Langan knew of the replevin case of Smith against Mrs. Mohr and was a witness in the case as to the value of the goods, but it does not appear that he knew the result of the trial in the circuit court. Defendant Leonori knew nothing about that suit, nor was he aware of or put to notice concerning any infirmity in the apparent title of Mrs. Smith to the goods. After selling the goods on March 26th, Mrs. Smith, on June 1, 1895, appealed the case to the St. Louis court of appeals, where later the judgment of the circuit court was affirmed. Mrs. Mohr then elected to take the goods and not their assessed value. The plaintiff, Mrs. Smith, failed to deliver them to the defendant, Mrs. Mohr, and the sheriff was unable to find them so as to return them to Mrs. Mohr. Thereupon, Mrs. Mohr instituted this action against Mrs. Smith, and defendant Langan and Leonori, claiming that Mrs. Smith had been guilty of conversion of the goods, and that defendants Langan and Leonori had actively aided and abetted Mrs. Smith in selling the goods and hence they were also guilty of conversion. The value of the goods was laid at five hundred dollars. The trial court instructed the jury: 1. That the possession of Mrs. Smith under the writ of replevin conferred upon her a right to hold the goods, as a bailee or keeper, until the determination of the replevin suit, but gave her no right or authority whatever to sell or dispose of the goods, and if she did sell them she was guilty of a conversion, and if the other defendants aided or abetted her in selling them they were also guilty of conversion; 2. That if Langan caused the goods to be hauled to Leonori's ⁴⁸¹ auction-house, knowing they were to be sold, then Langan was guilty of a conversion, adding, "and it is not material to such conversion whether said defendant Langan at such time knew of plaintiff's (Mrs. Mohr's) ownership of the goods or not"; 3. That if Leonori received the goods at his auction-house and sold them on account of Mrs. Smith or of Langan, then he, Leonori, was guilty of a conversion, and added, "and you are further instructed that in order to such holding of the defendant Leonori, it is immaterial whether or not said defendant Leonori had any knowledge at the time of plaintiff's ownership of the goods." There was a verdict for the plaintiff for five hundred and ninety-two dollars and ninety-one cents, which was

reduced to five hundred dollars by remittitur, and defendants Langan and Leonori appealed to the St. Louis court of appeals. That court affirmed the judgment of the circuit court (77 Mo. App. 481), but upon motion for rehearing, it appearing that its decision was in conflict with the decisions of the Kansas City court of appeals in Coen v. Watkins, 62 Mo. App. 502, the case was transferred to this court, as required by section 6 of the amendment of 1884 to article 6 of the constitution, and under that provision of the constitution the case must be determined here "as in case of jurisdiction obtained by ordinary appellate process."

1. The point of difference between the two courts of appeals is whether property seized under a writ of replevin and turned over to the plaintiff in the suit is in custodia legis or not. The St. Louis court of appeals holds that it is, while the Kansas City court of appeals holds that it is not. If it is, then the plaintiff in possession cannot sell it, and hence cannot pass a title to it even to an innocent purchaser for value ⁴⁸² and without notice, and incidentally it cannot be levied upon under attachment or execution or be replevied by a third person to the replevin action during the pendency of that suit. If it is not, then the converse is true.

There is an irreconcilable conflict of authority on this question. A full reference to or a critical analysis of the conflicting decisions is impossible in the limited space proper to be observed in the decision of this case. Much of the difference arises from diverse statutory regulation, and some of it may be ascribed to the fact that some cases treat a replevin bond as similar in all essential respects to a forthcoming bond, while other cases draw a distinction between the effect of the writ when used by a third person to recover possession of property that has been seized by an officer under judicial process, and when it is used to recover property from a private citizen.

Wells on Replevin, sections 476 to 480, discusses the reasons, pro and con, given in the leading cases, which hold diverse views on the subject, and concludes that under the modern functions of the writ, to wit, to try title, the plaintiff who acquires possession of goods by means of a writ of replevin does not thereby acquire title to the property, prior to the rendition of the judgment, and having no title he can convey none, pending the litigation, which will conclude or protect anyone, simply by force of the possession and apparent title resulting from such possession acquired under the writ.

Cobbey on Replevin, second edition, section 706, holds to the doctrine that pending the determination of the replevin suit the property is in custodia legis—the plaintiff has the possession but stands substituted for the sheriff, and that if the plaintiff in possession is wasting or destroying the property, or if it has a peculiar value so that in either case the loss cannot easily be compensated in damages, it is within the power of the court to appoint a receiver to care for it.

⁴⁸⁸ In 20 American and English Encyclopedia of Law, first edition, page 1065, the common-law rule is stated that property in custody of an officer is in custodia legis, and cannot be retaken by replevin, except when the process under which it is held is unconstitutional or the judgment void, and then it is said: "The rule now is, however, in most of the states, that an action of replevin may be maintained against an officer for goods taken by him in execution, by any person having property in the goods other than the defendant in execution; and it may also be replevied by the owner from the vendee at the execution sale; but the defendant cannot maintain it. . . . Property which has been attached may also be taken from the hands of the officer by writ of replevin by any person entitled thereto, save the attachment debtor or the plaintiff in attachment": 20 Am. & Eng. Ency. of Law, 1st ed., 1070.

The same authority (page 1074) states the rule to be: "Replevin lies for property replevied at the suit of any person other than the defendant in the first suit. The defendant, however, cannot maintain it while the action is pending. When the property has been delivered to the plaintiff in the first action, it may be taken from him by a third person claimant in the action of replevin. The fact that a judgment has been rendered in favor of a plaintiff will not hinder a stranger to the first action from maintaining another suit against the successful party. . . . Where the property has been taken by writ of replevin, it cannot be levied upon by judicial process."

It may be observed that the last sentence of the foregoing quotation conflicts with what precedes it in the paragraph quoted, for the writ of replevin is a judicial process, and it is pointed out that property seized on replevin may be replevied by a third person from the plaintiff in the first replevin suit.

Of the cases which held that property taken under a writ of replevin remains in custodia legis, even when the possession ⁴⁸⁹ is delivered to the plaintiff in the suit, he being regarded only as standing as a substitute for the sheriff, Lockwood v. Perry,

9 Met. 440, McKinney v. Purcell, 28 Kan. 446, Hunt v. Robinson, 11 Cal. 262, and Hagan v. Lucas, 10 Pet. 400, are fair exponents.

On the other hand, the cases which hold that the property does not remain in custodia legis after it has been delivered to the plaintiff in the replevin suit, and that such plaintiff may sell it and pass a good title to a bona fide purchaser, being liable to the defendant in the replevin suit for the value of the property if he ultimately loses his suit, are fairly illustrated by the cases of Gimble v. Ackley, 12 Iowa, 27, White v. Dolliver, 113 Mass. 400, 18 Am. Rep. 502, Davies v. Gambert, 57 Iowa, 239, 10 S. W. 658, Smith v. McGregor, 10 Ohio St. 461, and Ilsley v. Stubbs, 5 Mass. 280, but in no case is the proposition more clearly stated or more ably maintained than in Coen v. Watkins, 62 Mo. App. 502.

One of the reasons given for holding that the property is in custodia legis is, that if it can be levied upon by a third party, the plaintiff in replevin is disabled from returning it to the defendant in replevin, if the plaintiff fails in his suit, and hence would have to pay the defendant in replevin the assessed value of the property, and still would not have the property, for it would have been taken away from him by the third party under the second replevin, or by attachment or under execution, and in this way the same property might be utilized to discharge an indefinite number of debts of the same debtor.

This position is answered in Ilsley v. Stubbs, 5 Mass. 280, by holding that it is one of the consequences likely to ensue whenever a plaintiff takes property by replevin when he is not the true owner, and by the further consideration that the right of the true owner to recover his property cannot be impaired, ⁴⁸⁵ postponed, or taken away because of the pendency of a suit involving the property between third persons who have no title to it, as against the true owner, and to which suit the true owner is not a party.

It is further answered in the case of Coen v. Watkins, 62 Mo. App. 502, by holding that it would be a complete excuse to the plaintiff in the first replevin for failure to return the property, to show that it had been seized under judicial process while in his hands.

On the other hand, one of the chief reasons given for holding that the property is not in custodia legis after it has been turned over to the plaintiff in replevin is, that such a rule would

prevent the true owner from recovering his property while the first replevin suit was pending, notwithstanding the true owner was not a party to that action, did not claim title under either, but held title superior to that of either party to that action and hence no decision in that suit could bind or affect the true owner in any manner.

The previous decisions of this court have not clearly and definitely settled the law in this state. The first case decided was *Donohoe v. McAleer*, 37 Mo. 312. After obtaining possession of the property under the writ of replevin, the plaintiff sold the property. The defendant insisted that the plaintiff was not entitled to recover thereafter, as he no longer had title. The court very properly held that this was no defense. Cases are determined, ordinarily, as of the status and rights of the parties at the date of the institution of the suit. Instead of stopping here, Wagner, J., however, added: "The defendant unlawfully detained the property, and the plaintiff resorted to proper legal means to obtain its possession. When he had so reduced it to possession, he had a right to exercise all acts of ownership over it, including its sale and transfer, without impairing any right in the prosecution of his action. Had ⁴⁸⁶ he been defeated in his suit after he had parted with the property, the defendant would have been entitled to the full value." As the plaintiff recovered judgment in the replevin case, and as no right of any third person was involved in the case, this statement was not necessary to the decision of the case, and, hence it must be accepted in the light of the facts presented for adjudication.

In *Mansur v. Hill*, 22 Mo. App. 372, the Kansas City court of appeals followed this decision, so far only, however, as it held that the subsequent sale by the plaintiff in replevin was no defense.

In *Hawkins v. Taylor*, 15 Mo. App. 238, the facts were that the property had been seized on replevin in Arkansas by Renfro against Story, and turned over to Renfro. He sold it to his attorney, Joyner, and he sent it to Taylor, in St. Louis, who sold it for Joyner. Hawkins had interpleaded in the replevin suit in Arkansas, and claimed the property. Hawkins instituted an attachment suit in St. Louis against Story and summoned Taylor as garnishee. The replevin suit in Arkansas was still pending. The St. Louis court of appeals held that the writ of replevin conferred no title upon Renfro; that his possession, acquired under that writ, was a mere temporary right

of possession, and that Renfro could not sell the property so as to defeat the title of the true owner; and that the money in Taylor's hands represented the property, and hence the proceedings were stayed until the determination of the case in Arkansas. Lewis, P. J., however, said: "The order of delivery in replevin confers no title. It gives only a temporary right, which may terminate upon a judgment against the plaintiff. He cannot sell the property so as to defeat the title of the true owner: *Bruner v. Dyball*, 42 Ill. 34. He has, however, a possession which the defendant, or the real owner, has no right to disturb. The property is in the custody ⁴⁸⁷ of the law: *Hagan v. Lucas*, 10 Pet. 400."

The result reached in that case was undoubtedly right, for all the parties claiming title to the property were parties to the suit in Arkansas, and their respective rights could be adjudicated in that state. But it will be noticed that in the remarks quoted the learned judge held that when property is turned over to a plaintiff in replevin, even the true owner cannot disturb that possession; this, too, without qualifying the statement as to the rights of the true owner not being affected by a litigation to which he was not a party.

In *Metzner v. Graham*, 57 Mo. 404, it was held that when property has been seized on attachment and is in the hands of the sheriff awaiting judgment, it is in custodia legis and cannot be seized and sold on a special execution, issued by another court of co-ordinate jurisdiction, in a proceeding commenced subsequent to the levy of the attachment, but that the sheriff should return the special execution with an indorsement that the property is in his possession under a writ from a different court, and the plaintiff in the special execution may then have the matter transferred under the statute to the court where the attachment originated, where the conflicting claims could be settled. It will be observed, however, that this was not a replevin case, the property was in the hands of the sheriff and not in the possession of one of the parties, and, hence, it can only be of service in determining a replevin case in the event that the rule of law be established that the property is in custodia legis even when it is in the possession of the plaintiff in replevin.

In *Bates County Nat. Bank v. Owen*, 79 Mo. 429, it appeared that certain livestock were seized on execution. A third party replevied them and received possession of them under the writ. Thereafter, the sheriff levied on them under other exe-

cutions against the same debtor. Ewing, C., said: ⁴⁸⁸ "The general rule is, that property in legal custody is not subject to be seized by other judicial process; that when it is held under judicial process, it cannot be seized by virtue of other judicial process: *Stout v. La Follette*, 64 Ind. 365; *Pipher v. Foredyce*, 88 Ind. 436; *Metzner v. Graham*, 57 Mo. 404. In *Hagan v. Lucas*, 10 Pet. 400, it is said, in speaking of a similar case: 'On the giving of the bond the property is placed in the possession of the claimant. His custody is substituted for that of the sheriff. The property is not withdrawn from the custody of the law. Where vendees of a judgment debtor obtain possession of property by virtue of a writ of replevin, and by this process take it from the hands of the sheriff, it cannot, while the action of replevin is pending and undetermined, be again levied upon under another execution issued against the vendees': *Pipher v. Fordyce*, 88 Ind. 436. This view disposes of the case, and we consider it unnecessary to examine further."

This case did not involve a sale of the property by the plaintiff in replevin, pending the determination of that action, but did involve the right of third persons, not parties to the replevin suit, to levy on the property before the determination of that suit.

Thus, *Donohoe v. McAleer*, 37 Mo. 312, holds that the plaintiff in a replevin suit, who has obtained possession of the property under the writ of replevin, may sell the property, pending the litigation, subject to being liable to the defendant, on the bond, for the assessed value thereof, if he ultimately loses the case, while *Bates County Nat. Bank v. Owen*, 79 Mo. 429, holds that property in possession of a plaintiff in replevin cannot be levied upon by third persons under any kind of a judicial process. The *Donohoe* case proceeds upon the idea that the property, after it is turned over to the plaintiff in replevin, is not in custodia legis, while the *Owen* case is based squarely upon ⁴⁸⁹ the ground that it is in custodia legis.

In Missouri, the action of replevin is controlled entirely by statute. Chapter 56 of the Revised Statutes of 1899 is intended to provide for every contingency liable to arise between the parties to such an action. The statute does not attempt, however, to regulate the procedure in case third persons have or assert a right to the property hostile to both the parties to the replevin suit. Such proceedings by third persons are governed by the general principles of law. The general provisions of the statute are briefly these: Section 4463 prescribes the es-

essential requisites for the petition; section 4464 provides that upon the institution of the suit the court, or judge or clerk in vacation, shall make an order, requiring the defendant to deliver the property to the plaintiff, and, if it is not obeyed, requires the sheriff to take the property and deliver it to the plaintiff; section 4465 prohibits the sheriff from so taking or delivering the property to the plaintiff, until the plaintiff delivers to the sheriff a bond, to be approved by him "to the effect that they [the plaintiff and his sureties] are bound in double the value of the property stated in the affidavit, for the prosecution of the action with effect and without delay, for the return of the property to the defendant, if return thereof be adjudged, and, in default of such delivery, for the payment of the assessed value of such property, and for the payment of all damages for the taking and detention thereof, and for all costs which may accrue in the action"; section 4466 provides that upon the execution of such a bond by the plaintiff the sheriff shall take the property from the defendant and deliver it to the plaintiff, unless before such delivery the defendant, with sureties to be approved by the sheriff, shall execute a bond to the plaintiff, "for the delivery of said property to the plaintiff, if such delivery be adjudged, and in default of such delivery, for the payment of the assessed value of such property," for the damages for injuries ⁴⁹⁰ to the property, for its detention, and for the costs; section 4468 provides that the defendant cannot give such bond and retain possession of the property, pendente lite, if the plaintiff alleges that the property was wrongfully taken, and the cause of action accrued within one year; section 4474 provides that if the plaintiff fails in his action, and has the property in his possession, the judgment shall be that he return the property taken or pay the value assessed, at the election of the defendant, and also pay the damages; section 4476 provides that if the defendant gives bond and retains possession of the property, the judgment shall be that he return the property or pay the value assessed, at the election of the plaintiff, etc.; section 4477 provides that a party shall not be required to make such election until the property is delivered to the sheriff on proper process, and the party have notice thereof; section 4478 provides that if the property be not delivered to the officer within ten days after process issued, he shall levy and make the assessed value thereof, the damages and costs, of the property of the party against whom the process issued; section 4479 provides that "in such case, the party's right to the property shall

not be impaired by levying the assessed value thereof on the property of the other party and his sureties, or either of them; but if the property be delivered to the sheriff, and the party elect to take the value assessed, such election shall operate to vest all his right to the property in the other party"; and section 4480 provides that "the court may enforce all orders for the delivery of property as other orders of the court are enforced."

The statute clearly and conclusively contemplates that whichever party is allowed to have the possession of the property pending the litigation shall preserve it intact until the litigation is ended, and if he loses his suit he shall deliver it to the officer, to be by him turned over to the party adjudged ⁴⁹¹ entitled to it, if such winning party elects to take the property and not the assessed value. This is clearly demonstrated by section 4477, which provides that the winning party shall not be required to make an election until the property is delivered to the officer, and by sections 4478 and 4479, which provide that if the property is not delivered to the officer within ten days after process issued, the officer shall levy and make the assessed value, but that the winning party may still follow the property, if it can be found, and recover it, notwithstanding he has received its assessed value, and, e converso, that if the losing party properly delivers the property to the officer, and the winning party then elects to take the assessed value, "such election shall operate to vest all his [the winning party's] right to the property in the other party."

These statutory provisions manifestly treat the property as in custodia legis, pending the litigation, so far as the parties to the replevin suit are concerned, and exclude the right of the party in possession to sell the property during the pendency of the suit, and further preserve the right of the winning party to follow the property in the hands of any person who purchased it from the party in possession pending the litigation. The rule laid down in *Donohoe v. McAleer*, 37 Mo. 312, that the party in possession under a writ of replevin may sell the property and pass a good title, being liable only on his bond for the assessed value, is, therefore, no longer the law in this state, and should no longer be followed. But as the result reached in that case was right, under the facts in issue, and as what was then said about the right to sell was not necessary to a decision in that case, it is not necessary now to do more than

to disapprove of the doctrine announced under the law as it is and was then declared by statute.

But, while this is true, it does not follow that the property is in custodia legis as to third persons, so that it cannot be levied ⁴⁹² upon by any other kind of judicial process. Of course, it cannot be seized under any other kind of judicial process by either party to the replevin suit or their grantees or privies. But the weight of authority, amply supported by logic and reason (20 Am. & Eng. Ency. of Law, 1st ed., 1075), is that it may be seized by a third person, under any appropriate judicial process, who claims hostile to both parties to the replevin suit. This is manifestly the true rule, for, otherwise, the true owner or a creditor of the true owner, would be kept out of his own while a replevin suit was pending, and to which he or they were not parties, over which he had no control, and by the judgment in which his rights could in no manner be affected, impaired, or taken away, and which could not determine the title or claim of such owner or his creditor. No principle of law can be found to justify a rule which would thus postpone, at least, and might impair or effectually destroy, the rights of third persons. The common reason given for such holding, that if third persons could take the property from the possession of one of the parties to the replevin suit, he would be disabled from returning the property in case he lost his suit, and might have to pay his adversary in that suit the assessed value of the property, and still not have the property, is more specious than substantial, or right. The same result would follow if his adversary elected to take the assessed value and gave him his title to the property, and the true owner thereafter—after the termination of the replevin suit—seized the property. The fallacy in the reason so given lies in failing to observe that the judgment in the replevin suit only settles the controversy between the parties to that suit, and does not affect the rights of persons not parties to that suit.

All the difficulties and embarrassments suggested in the cases cited by counsel, as liable to result from allowing third persons to assert their claims to the property while the replevin ⁴⁹³ suit is pending, are completely dissipated by the simple remedy open to the party to the replevin suit from whom the possession of the property is taken under judicial process by a third party, pending the termination of the replevin suit, to plead, in such third party's action, that he held the property under a claim of title, which he was asserting in the replevin suit, and ask

that the other party to the replevin suit be made a party to such new suit, and the court could bring all the claimants before it and settle the whole controversy, and if the third party prevailed and recovered the property it would end the rights of both parties to the replevin suit. If the third party asserted his claim by replevin, the matter could be thus easily decided. If the property was seized on attachment or execution as the property of a third person, either party to the replevin suit could replevy it from the officer, and by proper notice to his adversary in the first replevin suit could require him to join in his effort to defeat the levy under the attachment or execution, and in this way the rights of the parties to the original replevin suit would be preserved, and if the third party prevailed in his suit, their right to a return of the property in the original suit would be concluded. So the difficulties which have induced some courts to hold that third persons cannot assert their rights pending the replevin suit are clearly seen to be chimerical, and are wholly insufficient to justify a holding that the rights of third persons can be postponed, affected, or impaired by the acts of parties in suits to which they are strangers.

For these reasons we conclude that, as to the parties to a replevin suit or their grantees or privies, the property is in *custodia legis* pending the determination of that suit, and cannot be sold by the party in possession or levied upon by either party or their privies, but that as to third persons the pendency of the replevin suit does not place the property in *custodia legis*, and does not bar their right to proceed against it by proper judicial process to establish their rights.

The case of *Bates County Nat. Bank v. Owen*, 79 Mo. 429, not being consonant with the rule here announced, must be overruled.

Applying this principle to the case at bar, it follows that Mrs. Smith had no power or right to sell the property pending the determination of the replevin suit, and it was a fraud upon Mrs. Mohr's rights for her to sell it, especially after she had lost the case in the circuit court and the property had been adjudged to Mrs. Mohr. It also follows that the purchaser from Mrs. Smith acquired no title, and Mrs. Mohr had a right, under sections 4478 and 4479, to receive the assessed value, and also to follow the property in the hands of the purchaser. But this Mrs. Mohr could not probably do, as it was personal property, and had been sold at auction to various unknown persons.

2. It is ably and strenuously argued, however, that defendant Langan is a regularly licensed warehouseman, and as he received the goods from Mrs. Smith, he could not question her right to demand their return, nor set up a paramount title in anyone else, and that no demand was made on him for the goods by Mrs. Mohr before this suit was begun, and hence he is not liable in this action for the conversion of the goods. The general rule of law is as contended for: Story on Bailments, sec. 108; Edwards on Bailments, secs. 54, 353; Dougherty v. Chapman, 29 Mo. App. 233; Pulliam v. Burlingame, 81 Mo. 111, 51 Am. Rep. 229; 26 Am. & Eng. Ency. of Law, 1st ed., 720-723.

But this general rule will not protect a bailee who, having notice of the rights of the real owner, yet aids and abets the ⁴⁰⁵ bailor in wrongfully converting the goods: Nanson v. Jacob, 93 Mo. 331, 3 Am. St. Rep. 531, 6 S. W. 246; Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324; Williams v. Wall, 60 Mo. 321; Dusky v. Rudder, 80 Mo. 400.

Langan was a witness in the replevin case of Mrs. Smith against Mrs. Mohr. True, he testified only as to the value of the property in dispute. But he knew the character of the action, and that both parties claimed title to the property. It does not appear that he knew the result of the trial in the circuit court, but when Mrs. Smith asked him to redeliver the goods to her he was advised that she intended to send them to an auction-house to be sold, and he aided her in doing so. Under these circumstances, he was put to notice as to the result of the trial, and must be held to have known what it was in his power to ascertain, that the title to the property had been adjudged to be in Mrs. Mohr. In addition to this, having reached the conclusion that the property, as to Mrs. Smith and Mrs. Mohr, was in custodia legis, and that Mrs. Smith had no right to sell it, it follows that as Langan knew of the replevin suit, he knew that Mrs. Smith had no power to sell it, and, as he aided her in doing so, he thereby became a party to the conversion, and his general exemption as a warehouseman is no protection to him, for he acted outside of his duties as such warehouseman: 26 Am. & Eng. Ency. of Law, 1st ed., 714-723, and cases cited in notes.

"The proposition that persons deal with property in chattels or exercise dominion over them at their peril is so well established as to have the force of a maxim in modern law. And the only limitation of this principle is found in dealing with the

liability of agents and servants acting innocently under authority of a principal, in possession or actual custody of the property, but whose title is really defective.

"Generally, the capacity in which a defendant commits a wrong can never enter as an element in the determination of ⁴⁹⁶ his liability; therefore, an agent invested with possession, who sells or otherwise deals with the property as owner, can never justify under the authority of his principal. But there are circumstances where, from the nature of the agent's act, and the character of his possession, the law absolves him from liability, although the rights of the owner are thereby infringed. A servant in charge of goods upon his master's premises does not ordinarily have such possession as would render him liable for a refusal to deliver at the request of the owner, of whose rights he is ignorant. Neither is an agent or servant liable who merely assists in a wrongful transfer of title, acting innocently in a ministerial capacity, without reference to the ownership of the goods. If B, having a wrongful possession of A's goods, employs a broker to sell, who sells to C, and all the broker does is to send bought and sold notes to B and C, no action of trover or any other form of action can be maintained against the broker. Upon the same principle, a carrier who transports goods from place to place, a packer who prepares goods for shipment; a watchmaker who repairs a watch and returns it to the person who left it, a farrier who shoes a horse for a thief, a broker who simply negotiates a contract of sale, cannot be charged for assisting a wrongdoer in his conversion, if ignorant of the rights of the owner.

"A rule which seems to embrace all cases, and forms an accurate test is: 'One who deals with goods at the request of a person who has the actual custody of them, in the bona fide belief that the custodian is the true owner, is excused for what he does, if the act is of such nature as would be excused if done by the authority of the person in possession, if he was the finder of the goods or intrusted with their custody': 26 Am. & Eng. Ency. of Law, 720-723, and cases cited in notes.

No principle found in the rules here quoted, or in the cases cited, would excuse Langan, for he did not act innocently, ⁴⁹⁷ but, on the contrary, with notice of Mrs. Smith's fraud, in selling the property when she had no right to do so, and he aided her in her wrongdoing, and thereby became liable.

The second instruction given for the plaintiff declared Langan liable if he aided Mrs. Smith in removing the goods to

the auction-house, knowing they were to be sold, and then declared it immaterial whether Langan knew of the plaintiff's ownership of the goods or not.

In *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324, a United States commissary voucher was stolen from the owner. Thereafter, it was purchased by an innocent third person from a stranger, and forwarded by the purchaser to the defendant in St. Louis, who collected it, and, acting without any notice of the infirmities of the title of the holder, turned over the proceeds to the principal. The agent was held liable to the true owner, although he acted innocently and without notice. Bliss, J., in delivering the opinion of the court, after calling attention to the fact that the doctrine of title by purchase in market overt is a part of the common law that has never been adopted in this country, said:

"The liability of those who meddle with stolen property, and do anything in regard to it, by which the owner is prevented from recovering it, has been fixed by repeated adjudications. We are referred, in this country, to *Hoffman v. Carow*, 22 Wend. 285, which is an affirmance by the court of errors of a judgment of the supreme court, reported in 20 Wend. 21, and in *Rogers v. Huie*, 1 Cal. 420. In both cases an auctioneer was held liable to the owner of stolen goods for their value, although he sold in the usual course of trade, without knowledge of the felony or the claim of the owner, and paid over the proceeds to the person for whom the sale was made. His sale was construed to be a conversion, although made for the ⁴⁹⁸ benefit of others. The doctrine of *Hoffman v. Carow*, 22 Wend. 285, has never been departed from in New York or elsewhere that I know of, but constantly affirmed. Justice Beardsley, in *Schroepel v. Corning*, 5 Denio, 240, says that 'any wrongful act which negatives or is inconsistent with the plaintiff's right is a conversion. It is not necessary that the defendant should have made use of the property in any way.' In England, the ancient doctrine that title passed for everything sold in market overt, with the requirement that the felon must be prosecuted to conviction before the property itself can be pursued, destroys the authority, in this country, of many of its decisions. And, yet, when nothing intervened to suspend the vindication of the owner's title, the same ruling is had as in *Hoffman v. Carow*, 22 Wend. 285, and *Rogers v. Huie*, 1 Cal. 420. In *Stephens v. Elwall*, 4 Maule & S. 259, the plaintiffs were the assignees in bankruptcy of one Spencer, and his goods, by the act of bankruptcy, became

vested in them. The bankrupt sold to one Deane, who bought for a trader in America, who had a house in London in which defendant was his clerk. Defendant received and shipped the goods to his principal, which act was held to be a conversion. Lord Ellenborough remarks: 'The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master, but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it.' Le Blank, justice, had held at the trial that the defendant was not liable, but, in Bank, said that he was mistaken. For further reference to the English decisions as to what constitutes conversion, see Bacon's Abridgment, title 'Trover,' under subdivision B.

"The cases above cited may not go quite the length of the present one, yet I can see no difference in principle. The ~~400~~ plaintiffs are deprived of their property through the wrongful i. e., unauthorized, act of defendants. They converted, i. e., turned it into money, and paid over the money to their principal without authority. A sale of another's property evidences conversion, and a demand in those states, where it is in general necessary, becomes useless. So, by analogy, would be any other voluntary act which changed its character and placed it beyond the reach of the owner. It is not necessary that he use the proceeds of the conversion for his own benefit.

"In all these cases the defendants complain of the hardship of being held for a wrong, when no wrong was intended. It may seem hard, but it is no harder than for the plaintiffs, without fault on their part, to lose their property. And besides, the defendants, without designing to injure the plaintiffs, were, as well as their principal, guilty of neglect. No one should buy property without good reason to believe that the seller has a right to sell it. The loose habit that prevails of buying everything that is offered is but a bounty to theft. If thieves found purchasers less eager for cheap bargains, though from total strangers, they would find it less easy to follow their vocation. Public policy, as well as private rights, demands that the settled rule that no title can pass through a thief should not be relaxed, and those who buy it of him should be compelled to give up the property, unless they have converted it, when they should be held for its value. Factors and agents also should be held to the same accountability. It is their duty to know for

whom they act, and whether they can be saved harmless if their action shall amount to a conversion of another's property. Every exoneration from responsibility in the premises but facilitates the enjoyment of the fruits of larceny, and the hardship one suffers in a case like that under consideration is but one of the everyday fruits of a want of proper caution in business.

⁵⁰⁰ "This doctrine of conversion should not, however, be carried too far. It is not the fact that one takes possession, merely, of property as a depositary or common carrier that should charge him, but some action by which it is converted into something else, as into money or other property, either by sale, exchange, or collection, or some other intermeddling inconsistent with the owner's right should be found in order to make the person responsible who has obtained innocent possession."

This case was followed and approved in *Williams v. Wall*, 60 Mo. 322, and it was said, by way of supplement thereto: "And authorities are not wanting that the same liability attaches to an unauthorized act, whether the actor was conscious of the wrong he was committing or not."

In *Dusky v. Rudder*, 80 Mo. 407, *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324, and *Williams v. Wall*, 60 Mo. 322, were expressly followed, and it was said: "The controlling question in this record is, whether a conversion of plaintiff's sheep or their wool, or the proceeds of either, took place as charged in the complaint. If the evidence establishes that a conversion of plaintiff's property occurred in either of these ways, and that the defendant in any manner aided in such conversion, the law holds him responsible therefor. True, a mere bailee, whether common carrier, or otherwise, may receive property from one not rightfully entitled to the possession, and may deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner. After such notice he acts at his peril: *Cooley on Torts*, 456. And the evidence tends to show notice to the defendant, and a conversion by him of the property of the plaintiff and of its proceeds. Any wrongful act which negatives or is inconsistent with the plaintiff's right is per se a conversion."

Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324, has also been approved in the following other cases: *National Bank of Commerce v. Morris*, 114 Mo. 255, 266, 35 Am. St. Rep. 754, 21 S. W. 511; *Ess* ⁵⁰¹ *v. Griffith*, 128 Mo. 62, 30 S. W. 343.

In *Ess v. Griffith*, 128 Mo. 62, 30 S. W. 343, the rule was thus stated by Macfarlane, J.: "All persons who jointly commit

a trespass are jointly liable for the consequences. The purchaser, with knowledge of the conversion, is jointly liable with the wrongful seller. The transaction is a joint conversion and creates but one cause of action: *Smut v. Briggs*, 64 Wis. 497, 25 N. W. 558. An agent who, for his principal, wrongfully takes or detains or sells the goods of another, is personally liable in an action of replevin, trover, or other action for the tort, even though he acted in good faith, supposing the goods to be his principal's, and although he has delivered the property to his principal: *Mechem on Agency*, sec. 574. That the principal is liable for the torts of his agent while acting within the scope of his agency cannot be questioned. It does not matter that the parties acted in good faith, and believed they had the right to take and dispose of the property. It may seem to be hard to be held for a wrong when no wrong was intended, but it is no harder than for the plaintiff, without fault on his part, to lose his property."

To which consideration it may be added that it is no greater hardship on the agent who has assisted in the conversion to be held liable to the owner, than it is to the purchaser to have to give up the property to the true owner after he has paid his money for it.

Auctioneers and brokers who, in the regular course of business, received and sold stolen goods, from the person in possession, without notice and in good faith, have been held liable in conversion, by the true owner: 26 Am. & Eng. Ency. of Law, 1st ed., 720, and cases cited in notes.

Following these precedents, it must be adjudged that the second instruction given for the plaintiff is not erroneous. For the same reasons, the third instruction given for the plaintiff, ⁵⁰² holding the auctioneer liable although he acted innocently and without notice, must be adjudged proper. True, the goods were not stolen goods, but they were in custodia legis as to Mrs. Smith and Mrs. Mohr, and it was fraud for Mrs. Smith to sell them, and, therefore, the same principle applies as in case of assisting in the sale of stolen goods.

The judgment of the circuit court is affirmed.

All concur.

A Conversion is any Unauthorized Act which deprives one of his property, permanently or for an indefinite time: *Union Stockyard etc. Co. v. Mallory*, 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888; monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 795-819, on trover and conversion. The intent with which the

wrongful act is done is not an essential element of conversion: *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631. An auctioneer is liable for selling the property of another, unless he can show some other excuse or justification than his good faith and his ignorance of the true owner's title: *Robinson v. Bird*, 158 Mass. 357, 35 Am. St. Rep. 495, 33 N. E. 391; *Kearney v. Clutton*, 101 Mich. 106, 45 Am. St. Rep. 394, 59 N. W. 419. A bailee converting property is answerable, no matter how good his intentions or how careful he has been: *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 154, 49 N. W. 502. A broker who sells stolen property, in good faith, is liable for conversion: *Fort v. Wells*, 14 Ind. App. 531, 56 Am. St. Rep. 316, 43 N. E. 155.

One Whose Property has been Replevied by a writ against his agent or bailee can retake it by replevin from the plaintiff in the first action, even during the pendency of that action: *White v. Dolliver*, 118 Mass. 400, 18 Am. Rep. 502.

CRIM v. CRIM.

[162 Mo. 544, 63 S. W. 482.]

CONTRACTS—READING BEFORE EXECUTION.—A person who is sui juris cannot release himself from the payment of a note or other contract in the absence of fraud, misrepresentation, trick, or concealment, on the ground that he did not read the contract before he signed it, if he had full opportunity to read it and deliberately signed it. (p. 523.)

CONTRACTS—EVIDENCE TO VARY.—In the absence of fraud or mistake, parol evidence is not admissible to contradict or vary a written agreement. (p. 524.)

JUDGMENTS—SUITS ON—DEFENSES.—After judgment on a note the latter is merged in the former, and defenses that might have been available if properly interposed in the suit on the note cannot be set up against the judgment. (p. 524.)

JUDGMENTS—DEFENSES.—FRAUD IN A NOTE constituting the cause of action is not a defense in an action on the judgment into which it has been merged. (p. 524.)

FOREIGN JUDGMENTS BY CONFESSION.—A judgment without process or actual appearance on a note containing a cognovit authorizing any attorney to appear in any court in the United States, waive process, enter appearance, and confess judgment for the amount due, with interest and costs, and release all errors, if authorized by the laws of the state where the judgment is rendered and the note is made, must be given "full faith and credit" when sued upon in another state. (p. 524.)

JUDGMENTS—FOREIGN—LIMITATIONS.—If judgment is obtained in one state, and before it has expired by limitation suit is brought thereon in another, the fact that the cause of action upon which the judgment was obtained has expired by limitation in the latter state is immaterial, and does not bar the action. (p. 525.)

White & McCammon, for the appellant.

Thurman, Wray & Timmonds, for the respondent.

550 MARSHALL, J. The following opinion was heretofore rendered in this case by Division One of this court:

"Action upon a foreign judgment for seven thousand and four dollars. Judgment for defendant. Plaintiff appeals.

"The parties are brothers, and both formerly lived in Ohio. The defendant was in debt to the plaintiff, and on the 10th of November, 1881, was about to remove to Missouri. The plaintiff demanded a settlement, and the defendant, as he says, because he would have had trouble if he had not done so, gave the plaintiff his note for four thousand dollars, payable at one year, with six per cent interest, in settlement of the debt. The note contained a cognovit authorizing any attorney at law to appear in any court of the United States, waive process, enter appearance, and confess judgment against defendant for the amount due on the note, including interest and costs, and to release all errors. On the 14th of October, 1891, the plaintiff instituted suit against the defendant in the court of common pleas of Stark county, Ohio, upon the note. Pursuant to the terms of the note, W. J. Piero, an attorney of that court, entered the defendant's appearance, waived process, and confessed judgment for seven thousand and four dollars, the principal and interest due on the note, released all errors, and waived all rights of appeal. Thereafter, the plaintiff instituted this suit in the Barton circuit court on the foreign judgment. The answer of the defendant is a general denial, with special pleas: 1. That the **551** Ohio court had no jurisdiction, because defendant was and had been for over ten years a resident of Barton county, Missouri, and was not summoned, and did not appear in the Ohio court, and never authorized Piero or anyone else to appear for him, and that at the time the suit was begun in Ohio the debt was barred by limitation in Missouri; 2. That the parties are brothers, and the defendant, being in debt to the plaintiff, was about to remove to Missouri, and plaintiff asked defendant to sign a note for the balance due plaintiff, saying he only wanted a settlement and would never enforce the note against defendant; that defendant did not in fact owe the plaintiff as much as four thousand dollars; that he signed the note understanding that it was only a promissory note, and not knowing that it contained a provision authorizing a confession of judgment, and never having agreed to grant such

authority to anyone; that the plaintiff falsely and fraudulently represented to him that it was only a promissory note, and concealed from him the fact that it contained a cognovit, and that, relying on the statements of the plaintiff, he signed the note without reading it or examining it.

"The trial developed the facts to be that notes of this character are usually used in Ohio; that the defendant had been largely engaged in dealing in cattle while he lived in Ohio, and had executed many such notes, and that several judgments had been rendered against him there upon similar notes under the cognovit therein contained; that he had procured many loans from the banks upon similar notes; and that the banks would not make loans upon any other kind of paper; that he had given similar notes to other persons before leaving Ohio; that there were no representations made to him about the character of this note when he signed it, and no attempt made to conceal its character from him; that he owed his brother some amount, the brother says five thousand dollars, and he says it was not so ⁵⁵² much, and that his brother offered to settle it if he would give him this note for four thousand dollars, and that he did so because, 'I expect I would have had to sign the note or got into trouble.'

"The court refused all the instructions asked by the plaintiff, and on its own motion instructed the jury as follows:

"'You are instructed that your verdict will be for the plaintiff for the full amount of the judgment sued on, with interest on the same from October 14, 1891, to date, at the rate of six per cent per annum, unless you further believe from the preponderance or greater weight of the evidence that the defendant, at the time he signed the note upon which the judgment sued on is based, had no knowledge that the said note contained a power of attorney to confess judgment, and had no intention to sign such a note, in which case your verdict will be for the defendant.'

"The jury found for the defendant, judgment was entered upon the verdict, and after proper steps the plaintiff appealed.

"1. There was no fraud, misrepresentation, trick, or concealment in the procurement of the note. It may be true the defendant did not read it before he signed it, but he was sui juris, had full opportunity to read it, and deliberately signed it. The law presumes he knew its contents, and he cannot be permitted now to take advantage of his own fault or negligence: *O'Bryan v. Kinney*, 74 Mo. 125; *Snider v. Adams' Express Co.*, 63 Mo.

876; *St. Louis etc. Ry. Co. v. Cleary*, 77 Mo. 637, 46 Am. Rep. 13; *Mateer v. Missouri Pac. Ry. Co.*, 105 Mo. 352, 16 S. W. 839; *Kellerman v. Kansas City etc. R. R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; 1 Wharton on Contracts, sec. 196.

"The defendant relies on *Wright v. McPike*, 70 Mo. 175, approving what was said in *Briggs v. Ewart*, 51 Mo. 249, 11 Am. Rep. 445, as ⁵⁵³ follows: 'It may be assumed as an axiom that no one can be made a party to a contract without his own consent. Although his signature may be put to the writing, and may have been written by himself, yet, if he did not know what he was signing, but acted honestly under the belief that he was signing some other paper, and not the one he really signed, he ought not to be bound by such signature.' In *McPike's* case this was quoted, and then it was said: 'Although that case has been overruled, the doctrine announced in the foregoing extract from the opinion was not disturbed by the court in the overruling decision. As between the original parties, if one has procured the signature of the other to a written agreement, whether by fraud or not, which does not contain the contract made by the parties, but a different one, he cannot be permitted to avail himself of that contract, but must stand by the one which was in fact entered into by both parties.'

"In *Briggs v. Ewart*, 51 Mo. 249, 11 Am. Rep. 445, it was held that such a defense could be made even if the note was held by a bona fide purchaser for value and without notice, before maturity. This case, as was also the case of *Corby v. Weddle*, 57 Mo. 452, which followed it, was expressly overruled in *Shirts v. Overjohn*, 60 Mo. 312.

"The doctrine further announced in *McPike's* case, that as between the original parties such questions are open to inquiry in a suit at law upon the note, whether the note was made by fraud or not, is no longer the law in this state, as the cases cited above clearly show.

"Courts of equity set aside contracts procured by fraud and reframe contracts where there has been a mutual mistake of the parties. But it is an invariable rule of law that, in the absence of fraud or mistake, parol evidence is not admissible to contradict or vary a written contract. The written contract is conclusively presumed to merge all prior negotiations and to ⁵⁵⁴ express the final agreement of the parties. To permit a party, when sued on a written contract, to admit that he signed it, but to deny that it expresses the agreement he made, or to allow him to admit that he signed it, but did not read it, or know

its stipulations, would absolutely destroy the value of all contracts and negotiable instruments. The reason underlying the rule is to give stability to written agreements, and to remove the temptation and possibility of perjury, which would be afforded if parol evidence was admissible.

"But aside from these considerations, this is a suit upon a judgment and not upon the note. The note is merged in the judgment, and the defenses that might have been available if properly interposed in the suit on the note are not open to review here. Even if there was fraud in the note constituting the cause of action, the judgment cannot be attacked. Only fraud in the very act procuring the judgment can be interposed as a defense to the judgment, even in a direct attack in equity to set aside the judgment: *Hamilton v. McLean*, 139 Mo. 678, 41 S. W. 224; *Bates v. Hamilton*, 144 Mo. 11, 66 Am. St. Rep. 407, 45 S. W. 641.

"2. Judgments upon notes containing such a cognovit are valid judgments in Ohio: *Matthews v. Thompson*, 3 Ohio, 272; *Watson v. Paine*, 25 Ohio St. 340; *Clements v. Hull*, 35 Ohio St. 141.

"Such judgments are also valid in other states: *Hansen v. Schlesinger*, 125 Ill. 230, 17 N. E. 718; *Roche v. Beldam*, 119 Ill. 320, 10 N. E. 191; *Holden v. Bull*, 1 Penr. & W. 460; *Ely v. Karmany*, 23 Pa. St. 314; *Stein v. Brunner*, 42 La. Ann. 772, 7 South. 718; *Mayer etc. Shoe Co. v. Falk*, 89 Wis. 216, 61 N. W. 562.

"The identical question here involved came before this court in *Randolph v. Keiler*, 21 Mo. 557, where the suit was upon a judgment rendered by the 'inferior court of common pleas, in and for the county of Sussex, state of New Jersey,' upon a note containing a cognovit in almost the exact terms with the note upon which the Ohio court entered judgment in this case. Practically the same defenses were made there that are made here. But it was held that such judgment was valid in New Jersey, even though neither of the parties were citizens of that state or had ever been in that state, and this being so the judgment was entitled to 'full force and credit' in this state, under section 1 of article 4 of the constitution of the United States, and hence the New Jersey judgment was enforced here.

"Similar judgments are enforced in other jurisdictions, even though the defendant was a resident of another state than that in which the judgment sought to be enforced was rendered: *Kitchen v. Bellefontaine National Bank*, 53 Kan. 242, 42 Am.

St. Rep. 282, 36 Pac. 344; Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576; Crafts v. Clark, 38 Iowa, 237; Nicholas v. Farwell, 24 Neb. 180, 38 N. W. 820; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; Sipes v. Whitney, 30 Ohio St. 69.

"The question whether the note upon which the judgment sued on was barred by limitation in Missouri is not open to review here. The suit is upon the judgment, and that is not barred by limitation.

"It follows that the trial court erred in giving the instruction quoted, and also that neither the answer nor the evidence shows any defense to the suit. The trial court should have directed a verdict for the plaintiff, and the judgment of that court is reversed, and the cause remanded to be proceeded with in accordance herewith."

Upon motion, the cause was transferred to court in Bank, upon the dissent of Valliant, J. The case has again been fully argued and further briefed by counsel.

In addition to what is said in the divisional opinion, it ³⁵⁸ is proper to say that the cases of D'Arcy v. Ketchum, 11 How. 165, and Pennoyer v. Neff, 95 U. S. 714, are not applicable to the case at bar; the first, because there was no service of any kind upon the partner who lived in Louisiana, and, therefore, the personal judgment of the New York court against him was void; and the second, because the service was by publication—constructive—and, therefore, it would not support a personal judgment, while in the case at bar the defendant was in court by his own voluntary act when the judgment was rendered against him.

Counsel for defendant, in a supplemental brief, has referred to the following cases as authority for the contention that the decision in this case and that in Randolph v. Keiler, 21 Mo. 557, are not in harmony with the rule and policy in this state: Overstreet v. Shannon, 1 Mo. 529; Sallee v. Hays, 3 Mo. 116; Smith v. Ross, 7 Mo. 464; Gillett v. Camp, 23 Mo. 375; Miles v. Jones, 28 Mo. 87; Foote v. Newell, 29 Mo. 400; Latimer v. Union Pac. Ry. Co., 43 Mo. 105, 97 Am. Dec. 378; Sevier v. Roddie, 51 Mo. 580; Gilbreath v. Bunce, 65 Mo. 349.

A careful examination of these cases shows, however, that they have no application to the case at bar. Thus, in Overstreet v. Shannon, 1 Mo. 375 (529), it appeared that the defendant had not been served in any manner in the foreign state. In Sallee v. Hays, 3 Mo. 116, the judgment was against the defendants, who were nonresidents of the foreign state, without

any service whatever, upon a covenant of their ancestor, and the decree charged the assets descended with the debt of the ancestor. It was alleged that such a decree was conclusive upon the parties in Kentucky. This court held that the judgment was not valid here because the defendants had not been brought into court in any manner whatever. In *Gillett v. Camp*, 23 Mo. 375, and *Latimer v. Union Pac. Ry. Co.*, 43 Mo. 105, 97 Am. Dec. 378, the judgment was based solely upon constructive service, by publication. ⁵⁵⁷ In *Smith v. Ross*, 7 Mo. 464, the action was upon a foreign judgment against Smith, who was served, and Haniman, as to whom the return to process was "not found," the judgment was held to be void as to Haniman, because he was never brought into court. In *Miles v. Jones*, 28 Mo. 87, the defendant was personally served, but the judgment was attacked, and set aside, because it was procured by fraud. In *Foote v. Newell*, 29 Mo. 400, it appeared that a judgment was rendered against the defendant in Indiana (it does not appear from the statement of facts whether the defendant was in court or not, but it seems to be assumed that he was; at any rate, that question was not involved in the case), and that the sheriff had levied upon the property, and that by virtue of a statute of that state, the defendant replevied the property levied on and obtained a stay of execution according to the law of that state, by giving a bond to pay the judgment. The statute provided: "And such bond, from the date of its execution, shall be taken as, and have the force and effect of, a judgment confessed in a court of record against the person or persons executing the same and against their estates, and execution may issue therein accordingly." The judgment was not paid, and the bond was sued on in this state as a judgment of the state of Indiana. It was held that such a bond had "no affinity" to a judgment, and was not such a judgment as is contemplated by the act of Congress. All of which is undoubtedly right, for such a bond is no more a judgment than is any contract or power of attorney authorizing a confession of a judgment. It is the act of the parties, and is not the judgment of a court. In *Sevier v. Roddie*, 51 Mo. 580, the action was upon a Tennessee judgment. It appeared that a third person had obtained a judgment against the defendant as principal, and the plaintiffs as his sureties. The sureties paid the judgment, and under the laws of Tennessee obtained a summary judgment, without ⁵⁵⁸ notice, against the principal, and the suit was upon this judgment. It was properly held that the judgment was not such a judgment as

the act of Congress contemplated, because the defendant not being in court, the proceeding was void. In *State v. Bunce*, 65 Mo. 349, it appeared that under the laws of Arkansas, the plaintiff, a minor, had been relieved of the disability of infancy "so far as to authorize him to demand, sue for, and receive all moneys belonging to him in the state of Missouri, in the hands of his curator," etc. Thereupon he sued the defendant, the curator of his estate in Missouri, upon his bond as such curator, to recover the estate in his hands. It was held that the minor could not maintain the suit, as under the laws of Missouri a minor can only appear by guardian, and that the legislature of Arkansas could not pass a law which would have the effect of giving a nonresident minor of this state a different status in the courts of this state from that of a resident minor in this state, when seeking the aid of the courts of this state. This decision is right, but it is not perceived how it applies to the case at bar, nor how the act of Congress has any bearing on it, for the action was not for the enforcement of a judgment of a foreign state, but was simply an attempt to make the minor of age when he came into the Missouri courts, contrary to the laws of this state. It did not remove his disabilities absolutely or at all in Arkansas, but only "so far as to authorize him to demand, sue for, and recover all moneys belonging to him in the state of Missouri, in the hands of his curator," etc. This was simply a bungling attempt by the lawmakers of Arkansas to control judicial proceedings in Missouri, and is without precedent in law that we are aware of.

The defendant strenuously contends that the case of *Grover etc. Sewing Machine Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. Rep. 92, is "on all-fours" with the case at bar. In that case it ⁵⁵⁹ appeared that: "B. a citizen of Maryland, having executed a bond, containing a warrant authorizing any attorney of any court of record in the state of New York, or any other state, to confess judgment for the penalty, and judgment having been entered against him in Pennsylvania by a prothonotary, without service of process, or appearance in person or by attorney, under a local law permitting that to be done, held: 1. That in a suit upon this judgment in Maryland, the courts of Maryland were not bound to hold the judgment as obligatory either on the ground of comity or of duty, contrary to the laws and policy of their own state; 2. B. could not properly be presumptively held to knowledge and acceptance of particular laws of Pennsylvania or of all the states other than his own, allow-

ing that to be done which was not authorized by the terms of the instrument he had executed." It was pointed out that a judgment of a sister state was required to be observed in another state only when: 1. The defendant was served with process, or voluntarily entered his appearance, "or that he had in some manner authorized the proceeding"; 2. That an instrument authorizing a confession of judgment must be strictly followed, and its terms could not be enlarged by reading into it the laws of another state, of which he is not charged with knowledge, and hence, if the power to confess judgment was conferred upon any attorney of any court of record, its terms could not be enlarged so as to authorize a prothonotary to confess judgment, even if the laws of the state where the judgment was rendered expressly permitted a prothonotary to act whenever any attorney was authorized to do so.

This case is "on all-fours" with the case at bar, and is ample support for the decision herein, so far as it holds that where the defendant has "authorized the proceeding," he is bound by the judgment, and the courts of other states must give force and effect to the judgment of the sister state, whenever ⁵⁶⁰ the authority has been strictly pursued, as is the case here, but it is unlike the case at bar in this, in that case the authority for the proceeding, conferred by the act of the defendant, was not strictly pursued, while here it was done. That judgment was held void in a sister state because a prothonotary does not come within the class of "attorneys of courts of record," and the act of such prothonotary was not, therefore, authorized by the defendant, and the law of the state could not enlarge the authority granted by the defendant. That decision is also valuable as showing plainly the principle upon which *D'Arcy v. Ketchum*, 11 How. 165, and *Pennoyer v. Neff*, 95 U. S. 714, both of which are referred to in that case, rested, to wit, that in neither case had the defendant been served with process or voluntarily appeared, or in any manner authorized the proceeding. It also accentuates the proposition that if the judgment is rendered against a party who is in court in any one of the three ways specified, it is valid, not only in the state where it is rendered, but, under the act of Congress, in all sister states.

We subscribe and adhere to all the cases cited and herein reviewed, but the rules there announced are not contravened by anything that is decided in the case at bar. On the contrary, those were all cases where the party sought to be charged had

not been brought into court by personal service, and had not voluntarily entered his appearance and had not authorized the proceeding against him, while in the case at bar the defendant had expressly authorized the exact proceeding that was had against him in Ohio.

For these reasons the opinion heretofore rendered in Division One is adopted as the opinion of the court in Bank, and the judgment of the circuit court is reversed and the case remanded to be proceeded with in accordance herewith.

Burgess, C. J., and Sherwood, Brace, and Gantt, JJ., concur.

Mr. Justice Valliant and Mr. Justice Robinson Dissented, maintaining, on the authority of *Pennoyer v. Neff*, 95 U. S. 714, that a judgment valid in the state where it is rendered is not required by the national law to be accorded full faith and credit in the courts of another state, if such judgment was obtained without actual service of process or actual entry of appearance by the defendant, and would be without authority if thus rendered by the courts of the latter state.

Parol Evidence to Vary a Contract in writing is considered in the monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 659-672.

A Judgment Merges the cause of action into the judgment: *Tourville v. Wabash R. R. Co.*, 148 Mo. 614, 71 Am. St. Rep. 650, 50 S. W. 300; *Ryan v. Southern etc. Assn.*, 50 S. C. 185, 62 Am. St. Rep. 831, 27 S. E. 618; *Russell v. McCall*, 141 N. Y. 437, 38 Am. St. Rep. 807, 36 N. E. 498. A judgment of a court in any state is a merger of the cause of action in every part of the Union: *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663. Contra, *Eastern etc. Bank v. Beebe*, 53 Vt. 177, 33 Am. Rep. 665.

A Judgment by Consent of the Parties should be accorded the same force as other judgments: *Short v. Taylor*, 137 Mo. 517, 59 Am. St. Rep. 508, 38 S. W. 952; *Adler v. Van Kirk Land etc. Co.*, 114 Ala. 551, 62 Am. St. Rep. 133, 21 South. 490. A judgment by confession rendered in one state must be given full faith and credit in another: *Kingman v. Paulson*, 126 Ind. 507, 22 Am. St. Rep. 611, 26 N. E. 393.

CENTRAL NATIONAL BANK v. HASELTINE.

[155 Mo. 58, 55 S. W. 1015.]

USURIOUS INTEREST PAID ON A NOTE GIVEN TO A NATIONAL BANK cannot be set off or credited on the principal in a suit by such bank. (p. 534.)

USURY—NATIONAL BANKS—REMEDY.—Usurious interest once paid on a note given to a national bank cannot, under the national statute, which is controlling, be set off or allowed as a credit on the principal of the debt. The remedy given by such statute to the person paying such interest to recover double the amount paid by an independent action is exclusive. (p. 534.)

G. S. Rathbun and S. A. Haseltine, for the appellants.

Massey & Tatlow, for the respondent.

• MARSHALL, J. This cause was transferred to this court by the St. Louis court of appeals, on the ground that an authority exercised under the United States is drawn in question, and hence this court has jurisdiction under section 12, article 6 of the constitution.

The controversy is this: The plaintiff, a national bank, organized under the laws of the United States, sues the defendants on a promissory note for two thousand two hundred and forty dollars. The defendants admit the execution of the note, but claim certain credits and setoffs, arising out of the fact that the note sued on is the consolidation of various smaller notes which had matured before the execution of this note, and that the defendants had paid to the plaintiff, within two years before the execution of this note, upon such other notes and upon this note, usurious interest aggregating five hundred and eighty dollars, which sum they asked to have deducted from the principal sum of two thousand two hundred and forty dollars represented by this note, thereby reducing the plaintiff's claim to sixteen hundred and sixty dollars.

The trial court referred the case to a referee to ascertain how much cash the plaintiff paid the defendants on the note sued on, how much interest had been reserved or taken out of all the notes, and how much interest was paid in cash by defendants not reserved. The referee found that defendants had received on this note of \$2,240, ⁶¹ the sum of \$2,199.35; that the interest reserved by the plaintiff out of this note was \$40.65; "that there had been paid by defendants as cash discounts on said loans up to October 24, 1895, the sum of \$566.70; that the

whole amount of interest paid and deducted by the bank on all of said loans from the beginning to the end was \$947.50; that these payments were made in excess of the legal rate for said loan." Thereupon the court entered judgment for the plaintiff for \$2,199.35, that being the face of the note sued on after deducting the discount of \$40.65 reserved when the note was executed. Defendants appealed.

1. Formerly it was the rule in Missouri that "one who voluntarily pays unlawful interest upon a usurious contract cannot recover it by suit": *Ransom v. Hays*, 39 Mo. 445; *Rutherford v. Williams*, 42 Mo. 18; *Ferguson v. Soden*, 111 Mo. 208, 19 S. W. 727. Nor could usurious interest once paid be applied as credits upon the note when it was sued on: *Perrine v. Poulson*, 53 Mo. 309; *Kirkpatrick v. Smith*, 55 Mo. 389. And the principal, with legal interest, could be recovered notwithstanding the usurious payment. Of course, if the usurious interest had not been actually paid, but only promised, the courts would not enforce the unlawful promise and would render judgment only for the principal with lawful interest.

This was the law until the act of November 20, 1855 (Rev. Stats. 1855, c. 85, sec. 5, p. 890), when it was enacted that, in a suit upon a note, bond, or agreement, the defendant might show by answer that a greater rate of interest than ten per cent "was therein or thereby agreed for, or received, or taken," and if the proof sustained the allegation, the court should render judgment for the principal, with ten per cent interest, but that the interest should go to the school fund, ⁶² and the defendant should recover his costs. This same provision was carried into the revision of 1865 (Gen. Stats. 1865, c. 89, sec. 5, p. 401), and into the revision of 1879 (Rev. Stats. 1879, c. 41, sec. 2727, p. 459), and into the revision of 1889 (Rev. Stats. 1889, c. 90, sec. 5976, p. 1429). The act of April 23, 1891 (Laws 1891, p. 169), amended section 5976 of the Revised Statutes of 1889 only so far as to reduce the legal rate of interest for which a party might contract from ten per cent to eight per cent. But by the act of April 21, 1891 (Laws 1891, p. 170), it was provided by section 1 thereof as follows: "Usury may be pleaded as a defense in civil actions in the courts of this state, and, upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment

for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness."

Under this statute, therefore, the usurious interest paid can be set off or credited on the principal when the lender sues. That is, the statute permits this to be done only as a defense to, or part payment of, the debt. It does not give the borrower a right to sue for and recover usurious interest already paid. In this respect the law is the same that it was before this statute was enacted. If this state statute governed in this case, the defendants would be entitled to the credits they claim.

But the plaintiff is a national bank, and therefore the statute of the United States controls the rights of the parties, and the state statute must yield. This was expressly so decided by the supreme court of the United States in ⁶³ Farmers' etc. Nat. Bank v. Dearing, 91 U. S. 33, where Mr. Justice Swayne, delivering the opinion of the court, said: "The national banks organized under the act" (Act June 3, 1864, now U. S. Rev. Stats. 1878, c. 3, tit. 62, p. 1003), "are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of necessity which existed for creating them Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.' Against the national will 'the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur."

The impelling reason that called for this conclusion was pointed out to be that the usury statutes of the several states differed widely, some forfeiting only the excess of interest, some the whole interest, and some the debt or demand as well as the interest, and it was held that Congress did not intend to per-

mit such different consequences to flow from a violation of the federal statute.

The section of the act of 1864, under consideration in that case has since been divided, and is now sections 5197 and 5198 of the Revised Statutes of the United States of 1878. By section 5197, national banks are permitted to charge the same rate of interest as is lawful in the states in which they are located, and if no rate is so prescribed, then they can charge seven per cent. Section ⁶⁴ 5198 provides that knowingly taking, receiving, reserving, or charging a greater rate of interest than section 5197 permits shall be deemed a forfeiture of the entire interest, and, in case such usurious interest is paid, the person paying it may "recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided, such action is commenced within two years from the time the usurious transaction occurred."

At first, it was held that the usurious interest, if paid, could be set off or allowed as a credit upon the principal when suit was brought to collect the principal, or it could be recovered in an independent action: *National Bank of Madison v. Davis*, 8 Biss. 100, Fed. Cas. No. 10,038; *Sydner v. Mt. Sterling Nat. Bank*, 94 Ky. 231, 21 S. W. 1050; *First Nat. Bank of Newton v. Turner*, 3 Kan. App. 352, 42 Pac. 936; *National Bank of Auburn v. Lewis*, 75 N. Y. 516, 31 Am. Rep. 484; *Overholt v. National Bank*, 82 Pa. St. 490; *Moniteau Nat. Bank v. Miller*, 73 Mo. 187.

But the supreme court of the United States has since held that usurious interest once paid cannot, under the federal statute, be set off or allowed as a credit on the principal of the debt, but that the remedy given by that statute to the person paying usury to recover double the interest so paid, by an independent action, is exclusive: *Barnet v. National Bank*, 98 U. S. 553, 559; *Driesbach v. National Bank*, 104 U. S. 52; *Stephens v. Monongahela Bank*, 111 U. S. 197, 4 Sup. Ct. Rep. 336, 337; *Carter v. Carusi*, 112 U. S. 478, 5 Sup. Ct. Rep. 281. The case of *Brown v. Marion Nat. Bank*, 169 U. S. 416, 18 Sup. Ct. Rep. 390, decides nothing to the contrary, for in that case the usurious interest was not paid, but was included in the face of the note, and it was simply held, as has always been the law, that the court would not lend its aid to the lender to recover usurious interest.

In *Driesbach v. National Bank*, 104 U. S. 52, Mr. Chief Jus-

tice Waite calls attention to the fact that the supreme court of Pennsylvania, in *First Nat. Bank v. Gruber*, 91 Pa. St. 377, followed *Barnet v. National Bank*, 98 U. S. 555, and overruled its former decisions (that usurious interest might be set off against the principal debt) in the cases of *Lucas v. Government Nat. Bank*, 78 Pa. St. 228, 21 Am. Rep. 17, and *Overholt v. National Bank*, 82 Pa. St. 490.

The rule declared by the supreme court of the United States was followed in *First Nat. Bank v. Childs*, 133 Mass. 248, 43 Am. Rep. 509; *National Bank v. Moore*, 83 Iowa, 743, 48 N. W. 1072; *Higley v. First Nat. Bank*, 26 Ohio St. 75, 20 Am. Rep. 759. In other words, the federal statute has created a new right of action, but has not given a right of setoff as to such matters, while the statute of Missouri gives a right of setoff, but not a right of action.

It follows that this court must, as in duty bound, follow the decisions of the supreme court of the United States, in construing this federal statute, and that under those decisions these defendants cannot set off or be allowed credit for the usurious interest paid, but that they are reverted to the exclusive remedy afforded by that statute of instituting an independent action to recover such usurious interest, and that the judgment of the circuit court, which proceeded on these principles, is correct. It also follows that the case of *Moniteau Nat. Bank v. Miller*, 73 Mo. 187, was erroneously decided, and it is therefore overruled.

The judgment of the circuit court is affirmed.

All concur.

The Principal Case was taken by writ of error to the supreme court of the United States, where the judgment of the state court was affirmed. The case is reported in *Haseltine v. Central Bank*, 183 U. S. 132, 22 Sup. Ct. Rep. 50. In delivering the opinion Mr. Justice Brown, after stating the facts and legal question involved, said:

"The only question involved in this case is whether, in an action upon a note given to a national bank, the maker may set off usurious interest paid in cash upon renewals of such note, and of all others of which it was a consolidation.

"In this case, defendants sought to show that they had paid to the plaintiff bank within two years prior to the execution of this note, upon other notes of which this was a consolidation, and also upon this note, usurious interest aggregating five hundred and eighty dollars, which they asked to have deducted from the

principal sum of two thousand two hundred and forty dollars, represented by this note, thereby reducing the plaintiff's claim to sixteen hundred and sixty dollars.

"We understand it to be conceded that, as the note in question was given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the national banking act, and not by the law of the state: *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29. In that case it was held that a law of New York forfeiting the entire debt for usury was superseded by the national banking law and that such law was only to be regarded in determining the penalty for usury.

"That part of the original national banking act which deals with the subject of usury and interest is now embraced in sections 5197 and 5198 of the Revised Statutes, the first one of which authorizes national banks to charge interest 'at the rate allowed by the laws of the state,' and, when no rate is fixed by such laws, a maximum rate of seven per cent. The next section is as follows:

"Sec. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred.'

"Two separate and distinct classes of cases are contemplated by this section: 1. Those wherein usurious interest has been taken, received, reserved, or charged, in which case there shall be 'a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon'; 2. In case usurious interest has been paid, the person paying it may recover back twice the amount of the interest 'thus paid from the association taking or receiving the same.'

"While the first class refers to interest taken and received, as well as that reserved or charged, the latter part of the clause apparently limits the forfeiture to such interest as the evidence of debt carries with it, or which has been agreed to be paid, in contradistinction to interest actually paid, which is covered by the second clause of the section. Carrying this perfectly obvious distinction in mind, the cases in this court are entirely harmonious.

"That of *Brown v. Marion Nat. Bank*, 169 U. S. 416, 18 Sup. Ct. Rep. 890, arose under the first clause. The facts are not

stated in the report of the case, but referring to the original record, it appears that plaintiff sued the bank to recover twice the amount of certain usurious interest paid to it. Another action was consolidated with this, in which plaintiff sought to enjoin defendant from proving certain notes against the estate of which he was assignee, in which a large amount of usurious interest had been included.

"In the opinion a distinction is drawn between usurious interest carried with the evidence of debt, or which has been agreed to be paid, and interest which has actually been paid, and it was said that interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of section 5198, and become principal; and that, in a suit by a national bank upon the note, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit; and that the forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. It was further held that interest included in a renewal note is not interest paid, since, if it were so, the borrower could, under the second clause of the section, sue the lender and recover back twice the amount of the interest thus paid, when he had not, in fact, paid the debt nor any part of the interest as such. The words, 'in case the greater rate of interest has been paid,' in section 5198, refer to interest actually paid, as distinguished from interest included in the note and 'agreed to be paid.'

"The cases under the second clause of the section are more numerous. *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, was an action by a national bank upon a bill of exchange. Defendants set up that the acceptors had been constant borrowers from the bank for several years, and that it had taken from them a large amount of usurious interest; that the bill in suit was the last of eight renewals, and that illegal interest had been taken upon the series to the amount of eleven hundred and sixteen dollars, which it was insisted should be applied as a payment upon the bill in question. It was also insisted that illegal interest had been taken upon other bills of exchange to the amount of six thousand three hundred and sixty-three dollars and twenty-four cents, and that the defendants were entitled to recover double this amount from the bank. It was held that the state statutes upon the subject of usury should be laid out of view, and that where a statute created a new right or offense and provided a

specific remedy or punishment, that remedy alone could apply; that the payment of usurious interest being distinctly averred, it could not be recovered by way of offset or payment of the bill in suit, and that the same rule applied to the payment of interest upon other bills of exchange which the defendants sought to recover back.

"The case of *Driesbach v. Second Nat. Bank*, 104 U. S. 52, was a like suit by a bank upon a note, upon several renewals of which usurious interest had been paid. It was said that, as the claim was not for interest stipulated for and included in the note sued on, but for the application of what had been actually paid as interest to the discharge of principal, there could be no setoff against the face of the notes.

"In *Stephens v. Monongahela Nat. Bank*, 111 U. S. 197, 4 Sup. Ct. Rep. 336—a similar case of interest actually paid—the averments of the defense were made under the first clause of the section; that 'the bank knowingly took, received, and charged' usurious interest, but as it elsewhere appeared that the interest stipulated had not been included in the note, but that interest had been actually paid at the time of the discount and renewals, which it was sought to apply to the discharge of the principal, the defense was held insufficient.

"The construction of both clauses of this section having been thus settled by this court, it only remains to determine to which class of cases the one under consideration properly belongs. As to this there can be no room for doubt. The referee finds that there was paid cash discounts on the several renewals of the notes which constitute the two thousand two hundred and forty dollar note, as well as the renewal of said note as executed, down to October 24, 1894, exclusive of the amounts reserved out of the notes at the time they were originally given, the sum of five hundred and sixty-six dollars and seventy cents, which cash discounts were paid in advance at the date of the several renewals. He further found that the 'defendants in their answer are only asking credit for the payments down to and including October 29, 1894, which aggregate the sum of five hundred and forty dollars and forty cents.' Under the rulings last above cited the person making these cash payments can only recover them back by a direct action against the association taking or receiving the same.

"The supreme court of Missouri was correct in holding that the defendants could not be allowed setoff or credit for the usurious interest thus paid, the remedy provided by the statute being exclusive, and its judgment is therefore affirmed."

The case of *Haseltine v. Central National Bank*, 155 Mo. 68, 56 S. W. 859, was the counterpart of the principal case, and was

brought to recover double the amount of the usurious interest paid on the note involved in that case, and the court decided that a person who has paid usurious interest on a note given to a national bank cannot, under the national statute and the interpretation thereof by the supreme court of the United States in *McBroom v. Scottish etc. Inv. Co.*, 153 U. S. 318, 14 Sup. Ct. Rep. 852, and *Brown v. Marion Nat. Bank*, 169 U. S. 416, 18 Sup. Ct. Rep. 390, maintain an action to recover twice the amount of the usurious interest paid, as provided by such statute, unless he has paid or offered to pay the principal of the note.

Usurious Transactions in General are discussed in the monographic notes to *Bank of Newport v. Cook*, 46 Am. St. Rep. 178-202; *Davis v. Garr*, 55 Am. Dec. 391-400. Knowingly taking by a national bank of a rate of interest greater than is allowed by law upon a loan of money does not entitle the person paying it to have it applied as payment of so much of the principal, in an action brought to recover the principal more than two years after such payment: *Higley v. First Nat. Bank*, 26 Ohio St. 75, 20 Am. Rep. 759. Where usurious interest has actually been paid to a national bank on the discount and renewal of a series of notes, it may not be set off in an action by the bank on the last of them: *National Exchange Bank v. Boylen*, 26 W. Va. 554, 58 Am. Rep. 113. Compare *Lucas v. Government Nat. Bank*, 78 Pa. St. 223, 21 Am. Rep. 17.

HURST v. KANSAS CITY, PITTSBURG AND GULF RAILROAD COMPANY.

[163 Mo. 309, 63 S. W. 695.]

MASTER AND SERVANT—SAFE PLACE TO WORK.—A brakeman on a regular freight train, who has nothing to do, directly or indirectly, with ballasting freightyards, may recover for an injury occasioned thereby, if the place where he was injured was not a reasonably safe place to work under the circumstances. (p. 542.)

MASTER AND SERVANT—ASSUMPTION OF RISKS.—An employé who accepts employment with full knowledge of the risks of his situation assumes such risks as are incident to the discharge of his duties, unless they were not so dangerous as to threaten immediate injury, or he might reasonably suppose that he could safely work by the use of care and caution. (p. 542.)

EVIDENCE.—EXPERT TESTIMONY is not admissible unless the jurors themselves are not capable of drawing correct conclusions from the facts proven. (p. 543.)

NEGLIGENCE—EXPERT TESTIMONY.—Error in admitting expert evidence to show what is a proper and safe condition of a railroad switchyard is not prejudicial to a defendant, guilty

of negligence in maintaining its yards in an unsafe condition. (p. 544.)

MASTER AND SERVANT—TWO WAYS OF DOING ACT—CONTRIBUTORY NEGLIGENCE—WHERE A BRAKEMAN, having the choice of two ways to board a car in an unsafe switch-yard, one of which is dangerous and the other not, voluntarily chooses the former and is injured, he is guilty of contributory negligence and cannot recover. (p. 544.)

Lathrop, Morrow, Fox & Moore, for the appellant.

Kinley & Kinley and Charles C. Hammond, for the respondent.

310 BURGESS, J. This is an action for damages for personal injuries alleged to have been sustained by plaintiff by reason of the negligence of defendant, in whose service he was at the time of the injury, to furnish him a safe place to work. The trial resulted in a verdict and judgment for plaintiff in the sum of four thousand seven hundred and fifty dollars, from which defendant appeals.

The facts, briefly stated, are that at the time of the accident plaintiff was in the service of defendant as rear brakeman on one of defendant's freight trains, running regularly between Mena, Arkansas, and Stilwell, Indian Territory, a divisional point, where there were a number of tracks for switching, and other purposes connected with the business of the road. On the morning of August 19, 1897, the train upon which plaintiff was braking arrived at Stilwell from the south. The road, up to this time, had been operated for nearly two years, and in March, 1897, Stilwell was made a divisional point, and it became necessary to ballast the defendant's tracks in its yards at that place, and in filling between the main track and the next one west of it, the defendant had, at the place where the injury was received, thrown rock, dirt, and gravel in piles, with level places between them, and had partially leveled the space between the tracks at this point, but, under orders of the roadmaster, had left the dirt scattered in small piles with the center between the two tracks from eight to ten inches higher than at the edges; at the depot and for a considerable distance north (the tracks running north and south with the depot south of where the injury was received), the tracks and grounds between them had been made level, and the dirt, where the injury was received, had been thrown off about two weeks before such injury; the plaintiff had been absent when this dirt had been thrown off, and

while defendant's employes were working on it; he had never, before the date of the injury, been on the ^{§17} ground in that part of the switchyards, though he had ridden on freight-cars into that part of the yard, but had not gotten down from them onto the ground. The testimony showed that the ground between the main track and the one west of it had been raised in the center between the two tracks and sloped toward the main track, with little mounds of earth mixed with stone and gravel, by the orders of the roadmaster, and had been so left by his orders. On the day of the injury the freight train of defendant had been pulled into these divisional yards, and, leaving the conductor at the depot, the train, with front and rear brakeman, engineer, and fireman, was pulled up into the north end of the yards, and the freight-cars switched onto the first track west of the main track, the plaintiff riding these freight-cars, setting brakes until the cars were set or stopped, and in the meantime the engine and caboose, with the head brakeman on the caboose managing the movements of the same, were backing slowly at a speed of from five to eight miles down the main track. The plaintiff got off of the cars on the switch track, where he had been working, and, walking to the main track, stood waiting the coming of the caboose and engine, the caboose being in front of the engine, and with his attention directed to the coming caboose, and when the end came to him, with it going at the rate of from five to eight miles per hour, plaintiff caught hold of the rods of the platform of the caboose next to him, set one foot on the step, and, to gain the motion of the caboose, took one or two steps on the ground with the other foot, and at the last step his foot struck or stepped on a stone that rolled under his foot, which threw him down, causing him to let go of the hold on the rods of the platform, and owing to the ground being sloping toward the track, his body rolled down toward the track and his right leg was run over by the wheel of the caboose that was nearest him, but the engine was stopped before the other wheel struck him. ^{§18} The injury caused the leg to be amputated.

The rules of the defendant forbid all persons boarding engines or cars while in too rapid motion, and the testimony showed "it was the duty of the brakeman in handling cars to get off and on the cars while in motion in the yards." The rules of the defendant were pleaded and also read in evidence. The evidence showed that an experienced brakeman, in doing work in the yards, could safely get on the cars in motion while going from

ten to twelve miles an hour, and that the ground in a switch-yard should be level with the end of the ties and between the tracks. The point is made that upon the entire record there was no evidence to support the verdict.

The right of defendant to do the work of ballasting its yards at Stilwell is not questioned. Nor can its right to do the work necessary for that purpose in its own way be doubted, provided, when so doing, it furnished its servants a reasonably safe place to work. But defendant insists that the rule which requires the master to furnish his servant a "reasonably safe place" to work does not apply in its entirety to servants employed in the construction of buildings or of railroad yards, and as plaintiff knew that work was being done and changes being made in the yards he must be held to have assumed the risk incident to these changes. But we do not think the facts as disclosed by the record in this case bring it within the rule contended for by the defendant, which is based upon the idea that the injured party was in some way connected with the construction of the road, or the work which was being done, either directly or remotely, at the time of the accident, hence the injured person was held to have assumed the risk incident to changes made in the construction of the work.

This rule is recognized in *Holloran v. Union Iron etc. Co.*, 133 Mo. 478, 35 S. W. 260, *Bradley v. Chicago etc. Ry. Co.*, 138 Mo. 302, 39 S. W. 763, ³¹⁹ and numerous other cases cited by defendants in their brief. In the case at bar, however, plaintiff had nothing whatever to do, either directly or indirectly, with ballasting the yards, but was a brakeman upon a regular freight train, and if the place where he was injured was not a reasonably safe place to work under the circumstances, and he was injured by reason thereof, he was entitled to recover, unless he assumed the risk or was guilty of negligence which contributed to his own injury.

When an employé has full knowledge of the risks of his situation, and accepts them, he assumes such risks as are incident to their discharge, and, if subsequently injured by such risks, he will not be entitled to recover damages for injuries sustained in consequence thereof, against his master, unless "it was not so dangerous as to threaten immediate injury, or, if he might have reasonably supposed that he could safely work about it by the use of care and caution": *Huhn v. Missouri Pac. Ry. Co.*, 92 Mo. 440, 4 S. W. 937; *Soeder v. St. Louis etc. Ry. Co.*, 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714; *Mahaney v. St.*

Louis etc. Ry. Co., 108 Mo. 191, 18 S. W. 895; **O'Mellia v. Kansas City etc. Ry. Co.**, 115 Mo. 215, 21 S. W. 503.

It is clear from the evidence that the place where the accident occurred was not a safe place for those in the service of defendant in its yards to work. It is equally clear that plaintiff had knowledge of its unsafe condition, and unless it was not so dangerous as to threaten immediate injury, or, if he might have reasonably supposed that he could safely work about it by the use of care and caution, he assumed the risks, and plaintiff's fourth instruction was in accordance with that theory and free from the objection urged against it.

The testimony showed that the rock and gravel had been placed between the tracks in the usual and ordinary way for the purpose of ballasting the yards, from which alone no reasonable inference of negligence could be drawn, for it was just as essential for the safety of its employes and trains as any other part of its superstructure. But although as thus deposited it was dangerous to the employes while at work in the yards, defendant would have not been guilty of negligence in permitting it to remain in that condition until a reasonable length of time had elapsed in which to scatter it or spread it out, but after the expiration of such time, if it was permitted to remain as originally deposited, it was guilty of negligence, and two weeks, we think, was more than necessary for the purpose.

On this question plaintiff, over the objection of defendant, was permitted to prove by a number of witnesses what would be the proper condition of the ground in a switchyard in order to be in a reasonably safe condition, and in this it is insisted that error was committed. The argument is that the question was not one for expert testimony, but was the province of the jury to determine from the facts in evidence.

The facts are so variant in the many adjudications upon this subject that it would be next to impossible to reconcile them, so that only a few of the more recent decisions of this court upon the subject will be noticed; namely, **Benjamin v. Metropolitan St. Ry. Co.**, 133 Mo. 288, 34 S. W. 590; **Goble v. Kansas City**, 148 Mo. 470, 50 S. W. 84; **Dammann v. St. Louis**, 152 Mo. 186, 53 S. W. 932; **Lee v. Knapp**, 155 Mo. 610, 56 S. W. 458.

The rule to be deduced from these authorities is that expert testimony is not admissible unless it is clear that the jurors themselves, from want of experience or knowledge of the subject, are not capable of drawing correct conclusions from the facts

proven. Under the facts proven the jurors were just as competent to determine whether or not the ground in the switchyard was in a proper condition to make it in a reasonably safe condition for persons working therein as were the witnesses.

§21 It follows that the court erred in admitting the testimony, but as we are of the opinion that defendant was guilty of negligence in maintaining its yards in an unsafe condition for so long a time after it became its duty to repair them, the error was not prejudicial.

But notwithstanding plaintiff may have been justified in continuing in the service of defendant knowing the danger attending it, yet if he was guilty of negligence contributing to his injury he was not entitled to recover.

Upon this theory of the case the evidence shows that in the forenoon of the 19th of August, 1897, the train upon which plaintiff was a brakeman arrived at Stilwell, from the south. It stopped at the depot and then proceeded toward the north end of the yards, and, upon reaching a point near the north switch, the caboose was cut off, the cars were then set on either the first sidetrack to the east or on the first sidetrack to the west of the main line. The engine was then backed down and coupled onto the caboose, where it had been cut off, and then it and the caboose moved together in a southerly direction for the purpose of putting the caboose away on the caboose track. In the meantime, plaintiff was walking along by the side of the main track, and in between it and the sidetrack, when he observed the engine of his train approaching, and when a few hundred feet away it began to slow down for the purpose of stopping in order that the plaintiff might get on. He had control of the train and might have had it stop, so that he could have gotten aboard with safety, but he signaled the brakeman riding on the south end of the caboose to go ahead, which was communicated to the engineer. The train was at that time moving about six miles per hour, and when it reached plaintiff he caught hold of both handholds of the south end of the §22 caboose and placed his left foot upon the lower step and took two or three steps with his right foot before swinging on, when that foot struck a stone, which rolled under his foot, breaking his hold on the rods, and causing his foot to slide or fall under the car, resulting in his injury.

The rules of defendant forbade employes in the train service "to board engines or cars while they are in too rapid motion," thus by implication at least permitting them to do so when they

were not so running. But all that remained for plaintiff to do for the time being was to place the caboose upon the proper track, there being no occasion for any unusual haste about the matter. He was an experienced brakeman, and knew the condition of the yards, and without permitting the train to slow up or stop, as he had the right to do that he might get on in safety, he signaled it to go on, and attempted to board it while moving at the rate of six miles per hour.

In *Moore v. Kansas City etc. Ry. Co.*, 146 Mo. 572, 48 S. W. 487, there is quoted with approval from *Bailey on Personal Injuries Relating to Master and Servant*, volume 1, section 1121, the following: "It is a familiar principle, which common sense, as well as the rules of law, ought to teach anyone, that where an employé of a railroad knowingly selects a dangerous way when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence."

Again in section 1123: "Where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover."

Plaintiff had choice of two ways to board a caboose, one that was not dangerous—that is, having the car to stop—the other that was dangerous—that is, boarding the car while moving ³²³ at a rate of speed of about six miles per hour. He choose the latter.

There was nothing to distract his attention, and no excuse whatever for his attempt to board the car at the time and under the circumstances. The rule of defendant did not require him to do so, and having voluntarily chosen the way of boarding the car which was dangerous, he must be held to have been guilty of contributory negligence.

The judgment is reversed.

Sherwood, P. J., and Gantt, J., concur.

A Servant Assumes the Risks of His Employment which are ordinary, obvious, or known, and incidental to the employment: *Illinois Steel Co. v. Bauman*, 178 Ill. 351, 69 Am. St. Rep. 316, 53 N. E. 107; *Lamson v. American Axe etc. Co.*, 177 Mass. 144, 63 Am. St. Rep. 267, 58 N. E. 585; *Louisville etc. R. R. Co. v. Stutts*, 105 Ala. 368, 53 Am. St. Rep. 127, 17 South. 29. The knowledge of a brakeman, however, of the unsafe condition of a railroad track upon which he is killed will not defeat a recovery for his death, if it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that

he could safely work on it by the use of care and caution: *Soeder v. St. Louis etc. Ry. Co.*, 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714.

A Master is Bound to Furnish a Reasonably Safe Place in which his servant is to work: *McMahon v. Ida Min. Co.*, 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; *Whipple v. New York etc. R. R. Co.*, 19 R. L. 587, 61 Am. St. Rep. 796, 25 Atl. 305; *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140, 46 Am. St. Rep. 429, 27 S. W. 476. And a servant has the right to assume that his master has discharged his duty in this respect: *Chicago etc. R. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 396, 48 N. E. 953; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 27 Am. St. Rep. 815, 13 S. E. 419.

Expert Testimony is not Admissible upon a question which the court or jury can decide from the facts: *Stumore v. Shaw*, 68 Md. 11, 6 Am. St. Rep. 412, 11 Atl. 360; *Dougherty v. Milliken*, 163 N. Y. 527, 79 Am. St. Rep. 608, 57 N. E. 757; monographic note to *Hammond v. Woodman*, 66 Am. Dec. 229. An expert witness cannot be asked, to determine a question of negligence, whether a certain structure is safe: *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108. See, too, *Dougherty v. Milliken*, 163 N. Y. 527, 79 Am. St. Rep. 608, 57 N. E. 757.

LOCKE v. McPHERSON.

[163 Mo. 493, 63 S. W. 726.]

MARRIED WOMEN'S ESTATES—HUSBAND'S RIGHTS IN.—At common law marriage operated as an absolute gift to the husband of the personal property of which the wife was possessed, and of her choses in action reduced to possession during coverture (p. 549.)

MARRIED WOMEN—ESTATES OF DECEDENTS—CHOSES IN ACTION.—A HUSBAND was entitled, at common law, to administer on the choses in action of his deceased wife not reduced to possession during her life, and in this way reduce them to possession for his own use. (p. 549.)

MARRIED WOMEN—DISTRIBUTION OF THEIR PERSONAL PROPERTY.—Under the statutes of Missouri, when a married woman dies intestate leaving personal property that she had held in her lifetime as her statutory separate estate, it passes to her administrator, and is distributed on final settlement according to the same statutes that direct the course of distribution of any other intestate's estate. (p. 551.)

MARRIED WOMEN—CONFLICT OF LAWS—DISTRIBUTION OF PERSONALTY.—A statute providing that the personal property of a nonresident shall be distributed according to the laws of the decedent's domicile has no application where there is no foreign law to govern the case; hence it cannot apply to the estate of a deceased woman who had married a nonresident in the state where her property is situated, where under the law of the foreign state there is no estate to distribute, and no statute of distribution by which the husband can take the estate. (p. 551.)

John H. Overall, for the appellant.

John R. Myers, George E. Smith, and Adiel Sherwood, for the respondents.

498 VALLIANT, J. This suit arises in the administration of the estate of Mary B. McPherson, deceased, and concerns its distribution; the contest is between the respondents, who were the brothers, claiming as distributees, and the appellant, who was the husband of the intestate.

The facts are as follows: On February 20, 1895, the intestate, who up to the date was Mary B. McVean, intermarried with the appellant, William J. McPherson. At the date of her marriage she was living in St. Louis, and had resided there for several years, and owned considerable real and personal property in this state.

499 The appellant, William J. McPherson, was then and for many years had been and has since continued to be a resident and citizen of New York. They were married in St. Louis, but it was her intention to go with her husband to his home in New York, and that was to be their residence. But her going was deferred until she might dispose of her house here. Her husband returned to his home leaving her in St. Louis, where in a few days she was taken ill and died March 22, 1895, it being little more than one month after her marriage. She died intestate, leaving no descendants. Her two brothers are her next of kin. The Mississippi Valley Trust Company was appointed administrator of her estate in this state, and paid all debts for which it was liable, and has on hand a considerable amount of personal property for distribution, and is ready to make final settlement. The husband was appointed administrator in New York, and, claiming to be the domiciliary administrator and also claiming as surviving husband, filed his petition in the St. Louis probate court, asking that the Missouri administrator turn over to him the personal property in hand. The probate court decided in his favor, but on appeal to the circuit court the judgment was that the estate be distributed to the two brothers, from which judgment the husband has taken this appeal.

The sole question is, whether the estate is to be distributed according to the statutes of this state relating to descents and distributions, or according to the law of New York determining the rights of a husband in personal property that belonged to his deceased wife in her lifetime.

There is an interesting and learned discussion in the briefs of counsel on the question whether the deceased, who was up to that time a resident and citizen of this state, became on her marriage a resident and citizen of New York, or an inhabitant⁵⁰⁰ of that state within the meaning of our statute presently quoted.

If the view we have taken of the subject in the end is correct, it would not be decisive of this case to concede that appellant is right in his contention that at the instant of her marriage the wife became an inhabitant of New York. Appellant's proposition is that immediately upon the marriage the abode of the husband in New York became the abode of the wife, and although her sudden illness and death prevented her removal in fact, and her death occurred in this state, yet she was at that time, in contemplation of law, an inhabitant of New York and her personal property here is to be distributed according to the laws of New York.

Our statute on which appellant relies is: "When administration shall be taken in this state on the estate of any person, who at the time of his decease was an inhabitant of any other state or country, . . . his personal estate shall be distributed and disposed of according to the laws of the state or country of which he was an inhabitant": Rev. Stats. 1899, sec. 254.

This has been the statute of this state since 1845 (Rev. Stats. 1845, sec. 19, p. 102), and has been repeated without change in all revisions since that date. At the origin of the enactment our statute in regard to the property rights of married women was not in existence; we are not, therefore, forced to construe it as applying to such case unless its provisions naturally embrace it. Assuming for the present that the intestate, at the time of her death, was an inhabitant of New York, the difficulty in applying that statute to this case is, that in New York there is no statute of distribution applying to the estate of a married woman dying without descendants. The law of that state in reference to the administration of the estate of an intestate does not recognize that a married woman, without a⁵⁰¹ descendant, has an estate in personal property to pass in succession at her death. The surviving husband in such case takes the estate, not as distributee or under the statute of distributions, but by the title that vested in him at his marriage by the common law to all his wife's personal property and choses in action. There is in that state a statute making the personal property owned by a woman at

the date of her marriage her separate estate, but according to the decisions to which we have been referred construing it, the effect of that statute, in a case like this, is only to suspend the husband's common-law marital rights during the life of his wife.

The statutes and decisions of New York bearing on the rights of the parties were in evidence at the trial in the circuit court, and the appellant, being himself a distinguished lawyer of that state, was a witness, and testified as an expert on that subject. It was shown that the common law prevailed there except as altered by statute; the statute of distribution was shown in evidence with this clause, of date 1813: "The preceding provisions respecting the distribution of estates shall not apply to personal estates of married women; but their husbands may demand, recover, and enjoy the same as they are entitled by the rules of the common law." Then in 1848 the statute above mentioned, making a married woman's personal property her separate estate, was passed, and afterward, in 1867, the above-quoted clause of the statute of distributions was amended to read as follows:.

"The preceding provisions respecting the distribution of estates shall apply to the personal estates of married women dying leaving descendants them surviving; and the husband of any such deceased married woman shall be entitled to the same distributive share in the personal estate of his wife to which a widow is entitled in the personal estate of her deceased husband by the provisions of this chapter and no more."

⁵⁰² In *Barnes v. Underwood*, 47 N. Y. 351, the court of appeals had under consideration the subject of the rights of a husband, who had survived his wife, in the personal estate left by her, she leaving no descendants, and those statutes were construed. It was pointed out in that case that at common law the marriage was an absolute gift to the husband of the personal property of which the wife was possessed, and also as to choses in action reduced to possession during coverture, but as to those not reduced to possession during her life the husband was entitled to administer on her estate and reduce them to possession in that way for his own use. But it was shown that the title he derived to the property was not under the statute of distributions but under the common law, whereby he had the right to administer and thereby appropriate the property to his own use; and that such was the common-law right incident to all administrators until the statute of distributions of 22 &

§ 23 Charles II was enacted, which in terms, like the New York statute of 1813, above quoted, excepted from its operation estates of married women. The court then takes up for consideration the clause of the statute of 1813 and its amendment in 1867 as both are above quoted. The language of the court (page 356) is: "Section 75 contains provisions respecting the distribution of estates of deceased persons; but it is obvious, in view of the provisions of the twenty-ninth and thirtieth sections and the entire absence of any provisions for the husband, that they were not intended to apply to the estates of married women leaving surviving husbands, but, to remove all doubt, the seventy-ninth section was enacted, expressly exempting such estates from their operation, and declaring that their husbands 'may demand, recover, and enjoy' such estates as they are entitled to by the rules of the common law." Section 79, referred to, is the clause of the statute of 1813 as above quoted. Then, after pointing out that the amendment of 1867 applied only ⁵⁰³ when the deceased wife left descendants, the court referred to the statute of 1848 and 1849 giving the wife the separate estate in her personal property and said: "The statute of 1848 and 1849 did not affect this right. Those statutes gave the wife control of her separate estate, with power of testamentary disposition during her life; but, if she died intestate, the rights of her husband, as her successor, are not affected. They prevent the husband from recovering possession and acquiring title during coverture, but they do not prevent administration by him, and consequent enjoyment of the property, upon the death of the wife. He has the same rights to property which he cannot reduce to possession, by reason of the statutes, that he had to that which he did not reduce to possession before the statutes were passed."

The subject was again before the court in *Robins v. McClure*, 100 N. Y. 328, 53 Am. Rep. 184, 3 N. E. 663, and it was then held that what was said in *Barnes v. Underwood*, 47 N. Y. 351, to the effect that the husband derived his title to the personal property left by his deceased wife by virtue of his right to administer, was not in accord with the former decision of that court, and was not approved; the court said: "The rule of the common law, which authorized the husband to hold the property of his wife by virtue of administration, has been extended in this state, so as to enable him to hold the same also by virtue of his marital rights, and numerous cases sustain this doctrine."

Then follows a discussion in which it is shown that, whilst the husband has the right to administer, his title to the property does not depend on his doing so, but exists *jure mariti*, even in spite of the administration by another. The court then concludes that the married woman's statutes of 1848 and 1849 made no change in the husband's common-law rights to her personal property left at her death, and that he took it not by virtue of his right to administer, not by way of succession, and ⁵⁰⁴ not by force of any statute of distribution, but by force of the common law, which gave him title *jure mariti* to his wife's personal property.

If, therefore, we are to follow the decisions of the New York court of appeals, to which we are referred, in order to adjudge the appellant entitled to the estate in question, we must hold that by virtue of his marriage in Missouri he acquired title to all her personal property, subject only to her right to the sole use and disposal of it during her life, and independent of our statutes directing the distribution of estates of intestates. Our married woman's statute makes no exception in favor of a non-resident husband. If the appellant in this case by his marriage acquired such a title to his wife's personal property, every husband marrying in this state a woman with personal property acquires a like right. This court has never yet put such a construction on our married woman's act. When a married woman dies intestate, leaving personal property that she had held in her lifetime as her statutory separate estate, it passes to her administrator and is distributed on final settlement according to the same statutes that direct the course of distribution of any other intestate's estate.

Section 254 of the Revised Statutes of 1899, above quoted, and on which the appellant relies by its very terms, applies only to property that belonged to the intestate in his lifetime and which becomes, on final settlement, a subject of distribution according to the laws directing the course of distribution of such estates. It was enacted long before we had a statute taking away the husband's common-law marital rights to his wife's personal property, and, therefore, did not contemplate the wife's peculiar estate. It directs that when the estate is ready for distribution it shall be distributed according to the laws of the state or country of which the intestate was an inhabitant. But in this case, if the intestate was an inhabitant of New York, we ⁵⁰⁵ cannot distribute her estate according to the laws of that state, because under the laws of that state the statute of distri-

butions does not apply to the estate of a married woman dying without descendants, for the reason that under the law of that state there was no estate to distribute; it belonged to the surviving husband by his common-law marital rights. To give section 254 application to this case we must construe it as referring, not to the foreign statute of distribution, but to the foreign law regulating the respective rights of husband and wife incident to marriage. And we must say also that it modifies the effect of our statute relating to the separate property of married women. If we are to recognize that a citizen of New York marrying in this state acquires, by virtue of his marriage, the interest in his wife's estate owned here that he would have acquired if he had married in his own state a wife owning like property there, we would also have to recognize the absolute rights of a husband coming from a state or country where the common law on the subject was unabridged. We do not recognize any such qualification of the rights of married women under our statute. Since, therefore, the husband did not, by virtue of his marriage here, acquire such title to his wife's personal property as he would have acquired to such property in New York if they had been married there, and since there is no statute of distributions in New York by which he can take the estate, he has no title to it. Section 254, above quoted, is but a legislative expression of a well-recognized rule of private international law, but since we find no foreign law to govern the case in hand, that statute has no application and we must administer the estate according to our own statutes.

There are other questions discussed in the briefs, but as the propositions above considered dispose of the whole case, there will be no necessity for deciding them.

The judgment of the circuit court is affirmed.

All concur.

THE CONFLICT OF LAWS AS AFFECTING THE RIGHTS AND OBLIGATIONS OF MARRIED WOMEN.

- I. Rights in Real Property.
 - a. Lex Loci Rei Sitae Governs Generally.
 - b. Effect of Change in Law.
 - c. Descent and Distribution.
- II. Rights in Personal Property.
 - a. Law of Domicile Governs Generally.
 - b. Change in Law.
 - c. Change of Domicile.

1. Effect Generally.

2. Presumption as to Foreign Law.

- d. Effect of Separation of Husband and Wife.

- e. Succession and Distribution.

III. Community Property.

- a. Effect of Nonresidence.

- b. Parties Married Outside the State.

- c. Effect of Removal to or from a State Where the Common Law Prevails.

- d. Effect of Marriage Contract.

- e. Change in Law.

IV. Right to Contract.

- a. Lex Loci Contractus.

1. Governs Generally.

2. Effect of Domicile.

3. Change in Law.

- b. Binding Separate Estate.

V. Contracts Between Husband and Wife.

- a. Generally.

- b. Marriage Settlements.

1. By What Law Construed.

2. Effect of Change of Domicile.

VI. Capacity to Sue and be Sued.

I. Rights in Real Property.

a. *Lex Loci Rei Sitae* Governs Generally.—The rights of married women in and to real property are generally determined by the law of the place where the real property is situated: *Newcomer v. Orem*, 2 Md. (271) 297, 56 Am. Dec. 717; *Vertner v. Humphreys*, 14 Smedes & M. 130; *McCollum v. Smith*, Meigs, 342, 33 Am. Dec. 147. Hence the rights of husband and wife to lands situated in one state under a conveyance in another, where all the parties reside, are to be determined by the laws of the former state: *Nelson v. Goree*, 34 Ala. 565. A married woman who owns land in Canada cannot, in Illinois, or elsewhere, recover rents for such land, without showing that she has a legal right to such rents by the laws of Canada: *Dempster v. Stephen*, 63 Ill. App. 126. The liability of a wife on covenants in a deed of her husband's land, in which she joins to release her interest therein, is governed by the laws of the state where the land is situated and the deed delivered, though the deed was acknowledged by her in another state: *Western Springs v. Collins*, 98 Fed. 933. And where a wife, in consideration of a conveyance to her, united with her husband in a conveyance of land situated in another state, by the laws of which the wife had no interest in the land, her uniting in the conveyance was held to form no consideration for the settlement upon her: *Vertner v. Humphreys*, 14 Smedes & M. 130.

The general rule was, in *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870, said to be well settled "that the power or capacity of a married woman to convey or encumber her real estate is to be determined by the law of the place where the property is situate. . . . Statutes which either give or destroy capacity to contract have, as a general rule, no extraterritorial force, where the particular contract involved relates to the conveyance or encumbering of real estate situate in a foreign jurisdiction." Hence it was held in this case that a mortgage executed in Kentucky to affect land in Indiana was to be governed by the Indiana laws. And the validity of a mortgage executed by a married woman in Ohio on land owned by her in Indiana is to be determined by the laws of the latter state: *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 308. To the same effect, see *Brown v. National Bank*, 44 Ohio St. 269, 6 N. E. 648. The courts have gone so far as to hold that if a married woman's contract relating to her real estate is valid by the law of the place where the property is situated, it will be enforced, even though by the law of the place where it was made and where she lived it would have been void by reason of her personal disability: *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870; *Johnston v. Gawtry*, 11 Mo. App. 322; *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 South. 12. *Augusta Ins. etc. Co. v. Morton*, 3 La. Ann. 417, would appear to conflict to some extent with these authorities. In this case the contract (a mortgage) of the wife was made in Maryland, the place of her domicile, and was valid by the law of that state. But the mortgage was on land in Louisiana. The court seems to hold that if the mortgage was valid where made, it would be enforced in the state where the realty was situated, notwithstanding by the law of that state a married woman had no power to so encumber her property. If the case sustains this broad doctrine it is without doubt opposed to the entire weight of authority elsewhere. The court uses this language: "The contract entered into in the present instance bound the property of the wife under the law of Maryland, where the contract was made, and where the husband and wife are domiciled. . . . If there be no objection to the validity of this mortgage except that resulting from her incapacity as a married woman, we find no just ground for declaring it to be invalid. It conflicts with no law of the state, and there is no reason of comity which would authorize a court in Louisiana to relieve the wife from its effect. It interferes with no real statute, and the personal statute does not reach it, by reason of the person not being subject to our jurisdiction and unaffected by our laws."

The validity and interpretation of personal obligations are generally to be determined by the laws of the state where they are made and to be performed: See subdivision IV, post. By means of this principle some of the cases, otherwise in conflict, may per-

haps be reconciled. Thus, in *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 South. 12, a note was executed by a married woman and her husband in Alabama, where a contract by a married woman was void, and a mortgage to secure it was given by the wife on her real property in Florida, by the laws of which state such a mortgage was valid. While there was no personal obligation on the part of the wife on the note, since it was void where made, yet the note was not totally void, for the husband was still bound by it. There being, then, a valid subsisting obligation, the wife could mortgage her land to secure it, providing such mortgage was authorized by the law of the state where such land was situated. Hence, in this case the mortgage was sustained and enforced. On the other hand, in *Evans v. Beaver*, 50 Ohio St. 190, 40 Am. St. Rep. 606, 33 N. E. 643, which seems to conflict with and is criticised in the Florida case, a mortgage was made in Indiana by a married woman domiciled there, on land which she owned in Ohio. Ordinarily, the validity and effect of such a mortgage would be determined by the law of Ohio, where the land was located. But the mortgage was given to secure the wife's obligation as surety for her husband upon a note for which he was liable. Her liability as surety was a personal one, to be determined by the law of the state where such contract was made, and in this case being in Indiana, the contract was void. The court said that a mortgage was only a security for the performance of some obligation, and if the obligation itself was void, the mortgage was of no avail. And having determined that the wife's obligation as surety was void, the mortgage which she gave to secure that obligation must fall with it. If the wife's mortgage had been given to secure the payment of her husband's note, it may be that the Ohio courts would have enforced it under the Ohio laws, such a mortgage being valid there. At any rate, these two cases and cases similar may be harmonized by ascertaining whether the obligation, to secure which the mortgage was given, is valid or not. But this distinction is without value as applied to many cases, and we shall subsequently see that as relates to a married woman's separate real estate, the general and better rule is that if she has power to charge it in the state where it is situated, she may charge it, though the contract is void by the law of the state where it is made: See *Johnston v. Gawtry*, 11 Mo. App. 322; *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870; *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 South. 12.

The distinction noted above between personal contracts and conveyances of land and the laws which govern each may become one of practical importance, however, and was applied in a recent Massachusetts case, where the court held that a covenant made by a husband to his wife in North Carolina, where they are domiciled,

to surrender all his rights in land owned by her in Massachusetts, will be enforced in the latter state, if she has a right to contract with him in North Carolina, notwithstanding by the laws of Massachusetts husband and wife could not contract with each other as respects land or otherwise: *Polson v. Stewart*, 167 Mass. 211, 57 Am. St. Rep. 452, 45 N. E. 737. Judge Holmes, speaking for the court, said: "But it is said that the laws of the parties' domicile could not authorize a contract between them as to lands in Massachusetts. Obviously this is not true. It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res. But the same reason inverted establishes that the *lex rei sitae* cannot control personal covenants, not purporting to be conveyances between persons outside the jurisdiction although concerning a thing within it." Chief Justice Field dissented, saying that it was illogical to hold that a direct conveyance of land between husband and wife would be void though made in a state where such a contract was authorized, and yet that a contract to convey would be specifically enforced.

These authorities seem to admit that the capacity of a person to take land is determined solely by the law of the place where it is situated. Story states the rule in the same way: *Story on Conflict of Laws*, sec. 430. But in *Kelly v. Davis*, 28 La. Ann. 773, where a husband residing in Mississippi conveyed to his wife land situated in Louisiana, it was held that the capacity of the parties to make the contract must be determined by the laws of their domicile. And in *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418, a married woman domiciled in South Carolina, and authorized by the laws of that state to purchase land, was held competent to purchase lands situated in North Carolina, though a mortgage which she made of the same land was properly held void because not made as required by the law of the place where the property was situated.

b. *Effect of Change in Law.*—The capacity of a married woman to convey land, and the effect of her conveyance, is tested by the law in force when she executes the deed, and not by that in existence when she acquired the property: *Ray v. Crouch*, 10 Mo. App. 821. In *Riddick v. Walsh*, 15 Mo. 519, the court intimates the correct rule to be that the marital rights of the parties are to be determined by the law existing at the time of their marriage, and not that at the time of its dissolution by death, yet it applied the contrary rule as being the one universally acted upon. Yet the rights of married persons, so far as property is concerned, are usually determined by the law in force when the property was acquired. Hence, property acquired in Nevada before the adoption of the state constitution and before the passage of an act providing for

the common property of husband and wife was held to be governed by the rules of the common law in force before that time: *Darrenberger v. Haupt*, 10 Nev. 43. And property acquired by a married woman in California before its cession to the United States is governed by the Mexican law: *Racoullat v. Sansevain*, 82 Cal. 376. And the rights and obligations which flow from a marriage in Texas before its annexation to the United States will be governed, at least where applicable, by the Spanish law: *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121.

c. **Descent and Distribution.**—The rules which govern the descent and distribution of real property are determined by the law of the state where the land is situated: *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 South. 12. In *Smith v. McAtee*, 27 Md. 420, 92 Am. Dec. 641, real property in Maryland was devised to a wife, who resided with her husband in Illinois. The property was sold, the husband disclaiming all interest in it, and the proceeds decreed and credited to the sole and separate use of the wife, and the husband was held to take no interest in the proceeds by virtue of the law of Illinois, their domicile. In *Franklin v. Piper*, 5 Tex. Civ. App. 253, 23 S. W. 942, land certificates relating to land in Texas were deemed personal property, and when inherited by a married woman domiciled in Virginia, they passed to her husband by virtue of the common law which prevailed in that state.

II. Rights in Personal Property.

a. **Law of Domicile Governs Generally.**—The law of the state where the parties are married and where they reside govern the rights which each party takes in the personal property of the other, and which either owned at the time of the marriage: *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198. This, of course, is true where they are married and reside in the same state: *McIntyre v. Chappell*, 4 Tex. 187; *Hayden v. Nutt*, 4 La. Ann. 65. The law of the matrimonial domicile prevails and governs the personal property rights of the parties: *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198; *Oahalan v. Monroe*, 70 Ala. 271. This is true wherever the personal property may be situated: *Newcomer v. Orem*, 2 Md. (271) 297, 56 Am. Dec. 717; *Lyon v. Knott*, 26 Miss. 548. When personal property is conveyed to a husband or wife, their rights therein, as between themselves, are to be determined by the laws of their domicile: *Nelson v. Goree*, 34 Ala. 565. If at the time of their marriage husband and wife live in different states, and the marriage occurs at the domicile of the husband, the laws of that state will regulate their rights in personal property: *McIntyre v. Chappell*, 4 Tex. 187. The law of the place where the parties intend, at the time of their marriage to make their domicile, governs the right in personal property resulting from the marriage, when that intention is unequivocal.

cally ascertained, and is supported by actual removal to the place contemplated: *Hayden v. Nutt*, 4 La. Ann. 65. So where they are married in one state, intending to fix their matrimonial domicile in another, which they accordingly do, their rights in personal property are determined by the laws of the latter state: *Arendell v. Arendell*, 10 La. Ann. 566. Hence, where parties are married in Massachusetts with a previous intent to live in Connecticut, and go directly to Connecticut to reside, the laws of that state regulate the rights of the parties in personal property: *Mason v. Fuller*, 36 Conn. 160. The matrimonial domicile is presumed to be that of the husband at the time of the marriage: *Parrett v. Palmer*, 8 Ind. App. 356, 52 Am. St. Rep. 479, 35 N. E. 713. And the law of the husband's domicile regulates the marital rights of the parties as to movable property, wherever the marriage took place: *Land v. Land*, 14 Smedes & M. 99; *Layne v. Pardee*, 2 Swan, 232. Thus, where the parties reside in Kentucky, and the husband sells community property in Texas, the proceeds belong to the husband in accordance with the laws of Kentucky: *Cooke v. Fidelity etc. Co.*, 20 Ky. Law Rep. 657, 47 S. W. 325. Where slaves in Texas were left in trust for the wife, to become hers absolutely on the death of her husband, the subsequent death of the husband and her remarriage in Alabama and domicile there, caused the slaves to become the property of the second husband: *Vardeman v. Lawson*, 17 Tex. 10. In *Craycroft v. Morehead*, 67 N. C. 422, where a judgment was obtained in North Carolina by a single woman against a man whom she subsequently married, the rights of the parties in reference to the judgment were governed by the Pennsylvania laws, where the parties had their matrimonial domicile. Where a statute conferred on a husband the right to sue for the property of his wife, he was held entitled to maintain such suit, though the wife died in another state and though the property might not belong to him when recovered: *Hatton v. Weems*, 12 Gill & J. 83.

The law of the domicile does not apply in every case, however. It is only through comity that it applies in any event, where the property is situated in a state other than the domicile, in which the foreign law is evoked and sought to be enforced. Hence, where the law of the domicile is repugnant to the policy of the state where the property is located, it will not prevail: *Mahorner v. Hooe*, 9 Smedes & M. 247, 48 Am. Dec. 706. In *Graham v. First Nat. Bank*, 20 Hun, 326, affirmed in 84 N. Y. 893, 38 Am. Rep. 528, it was held that the right of a man to receive dividends on the bank stock owned by his wife would be determined by the law of the place where the bank was situated, and not by that of the domicile of the parties. The question of the conflict of laws in such a case was fully discussed by Judge Finch in this case in the court of appeals. It was urged that the dividends on the bank stock being personal

property of the wife, the rights of the husband and wife thereto must be determined by the law of their domicile, and not by the foreign law where the bank was situated. While admitting this to be true, in general, as between themselves, yet the court said: "It does not follow that it is true as between them and a debtor in another state, whose contract is made there, and is there to be performed. Such a fact introduces a new element into the problem. . . . It is a legal fiction which attaches the property to the domicile, and the actual fact may be otherwise. . . . The fiction or maxim, 'Mobilia personam sequuntur,' is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action." And the conclusion was reached that in a case such as this, fiction yielded to fact, and the actual situs of the property controlled.

b. **Change in Law.**—Property acquired before a change in the law seems to be governed by the law as it stood before such change was made. Hence, where property was acquired in Nevada before the adoption of the constitution and before a statute was passed providing for the common property of husband and wife, their rights in the property were to be determined by the rules of the common law in force when the property was acquired: *Darrenberger v. Haupt*, 10 Nev. 43.

c. **Change of Domicile.**

1. **Effect, Generally.**—After married parties change their domicile by removal to another state, the law of their actual domicile governs their rights in their personal property: *Townes v. Durbin*, 3 Met. (Ky.), 352, 77 Am. Dec. 176; *McCollum v. Smith*, Meigs, 342, 83 Am. Dec. 147; *Lyon v. Knott*, 26 Miss. 548; *Gidney v. Moore*, 80 N. C. 484.

But the law of the new domicile affects only after-acquired property: *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198; *Cahalan v. Monroe etc. Co.*, 70 Ala. 271; *Bush v. Garner*, 73 Ala. 162; *Morales v. Marigny*, 14 La. Ann. 855, and cases cited above. Property acquired by husband and wife while actually in transit from one state to another is governed by the law of the state where they take up their residence: *State v. Barrow*, 14 Tex. 179, 65 Am. Dec. 109.

The removal from one state to another will not alter the rights of either party to the property then in their possession, the title to which has already become vested under the law of their former domicile: *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198; *Cahalan v. Monroe etc. Co.*, 70 Ala. 271. The laws of one state will not generally affect the powers and interest which a married woman has already acquired in property in another jurisdiction: *Block v. Cross*, 36 Miss. 549. Hence, where a wife acquires an equitable in-

terest in property in one state, the character of her interest is not changed by removal to another state: *Irwin v. Bailey*, 72 Ala. 467; *Gluck v. Cox*, 90 Ala. 331, 8 South. 161. Her equitable title will not by removal be changed to a legal one: *Gluck v. Cox*, 75 Ala. 810. Personal property purchased by a wife in one state, where such property belongs to the husband, will remain his after removal to another state: *Tinkler v. Cox*, 68 Ill. 119. And where the proceeds from the sale of a wife's property go to the husband, a change of domicile will not affect his interest: *Eager v. Brown*, 14 La. Ann. 695. Neither the character of the title nor the status of the estate is affected by any subsequent change, or successive changes, of one kind of personal property for another, after removal: *Gluck v. Cox*, 90 Ala. 331, 8 South. 161; *Oliver v. Robertson*, 41 Tex. 422. And it seems that the interest of husband or wife in personal property acquired in one state where they were domiciled, and removed to another, upon a change of residence, is not changed or affected by an investment of such property in realty situated in the state of their new domicile: *Parrott v. Nimmo*, 28 Ark. 351; *Oliver v. Robertson*, 41 Tex. 422. See, also, *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88. Money owned by a woman at the time of her marriage in England, and brought to this country upon the removal of the parties here, belongs to the husband, even after it is invested here: *Stokes v. Macken*, 62 Barb. 145. In *Kendall v. Coons*, 1 Bush, 530, a lien created by the laws of Louisiana, where the parties resided, in favor of a wife, upon the estate and future acquisitions of her husband, were enforced in another state to which they subsequently removed. If a husband waives his common-law rights in his wife's property at the place of their domicile, it remains her separate property upon removal to another state: *Cooper v. Standley*, 40 Mo. App. 138. As supporting the rule that the interest acquired by a husband or wife in personal property while residing in one state is not changed by their removal to another state, see, further, *Beard v. Basye*, 7 B. Mon. 133; *Jeter v. Deslondes*, 6 La. Ann. 379; *Arnold v. McBride*, 6 La. Ann. 703; *McClain v. Abshire*, 72 Mo. App. 390; *Meyer v. McCabe*, 73 Mo. 236; *State v. Carroll*, 6 Mo. App. 263; *State v. Chatham Nat. Bank*, 10 Mo. App. 482; *State v. Smith*, 20 Mo. App. 50; *State v. Chatham Nat. Bank*, 80 Mo. 626. These numerous cases cited from Missouri clearly establish this rule in that state. But the same court in *Minor v. Cardwell*, 37 Mo. 350, 90 Am. Dec. 390, held that where a wife acquired slaves in another state where the parties were domiciled, and in which such property was treated as realty, and belonged to the wife, yet on removal to Missouri taking the slaves with them, they became personal property to which the husband was entitled. This case may appear to conflict with the other Missouri decisions, but its facts obviously distinguished it from the

other cases, and it may be harmonized (if this were necessary) under the rule stated in *McCollum v. Smith*, 1 Meigs, 342, 83 Am. Dec. 147, that every state has the absolute right to impress upon property any character it chooses, and hence, in the Missouri case, slaves being personalty by the Missouri laws, their character could not be affected by the laws of the state from which they had been removed. And if not affected by the foreign law, the wife could claim no interest thereunder.

After the parties have removed to another state, they may, by their own acts, change the nature of their interest in personal property, so as to give the other spouse an interest therein in harmony with the law of their new domicile: *Avery v. Avery*, 12 Tex. 54, 62 Am. Dec. 513.

Where title or interest in property is claimed to be valid under the laws of another state where it was acquired, it must appear what those laws are, otherwise, it has been held in Louisiana, the validity of the title will be made to depend upon the laws of the present domicile of the parties: *Atkinson v. Atkinson*, 15 La. Ann. 491. See, however, the next subdivision as to presumptions as to foreign law. It must be clear that the domicile of a married woman has been changed, or her rights will be regulated by the law of her original domicile. Hence, where a married couple domiciled in Missouri, go to Illinois with the intention of becoming residents of one of two towns in Illinois, but they never determined which place to reside, and the wife dies, her domicile was held to be still in Missouri, and the distribution of her personal property was to be governed by the laws of that state: *Cooper v. Beers*, 143 Ill. 25, 83 N. E. 61.

A married woman, domiciled in one state where she holds property to her separate use, in suing for an injury thereto in the courts of another state, is governed by the laws of the latter state, so far as her remedy is concerned: *Stoneman v. Erie Ry. Co.*, 52 N. Y. 429. She may maintain such an action to recover her personal property, though if she were domiciled in the jurisdiction where suit is brought, the property would belong to her husband: *Frank v. Hirsh*, 3 App. D. C. 491.

2. **Presumption as to Foreign Law.**—Where personal property is brought to one state by married parties who were domiciled in another state at the time it was acquired, their rights therein will be determined by the law of their former domicile, and in the absence of proof to the contrary, it will be presumed that the common law was in force in such state: *Cahalan v. Monroe etc. Co.*, 70 Ala. 271; *Hydrick v. Burke*, 80 Ark. 124; *Schurman v. Marley*, 29 Ind. 458; *Lichtenberger v. Graham*, 50 Ind. 288; *Van Ingen v. Brabrook*, 27 Ill. App. 401; *Miller v. MacVeagh*, 40 Ill. App. 532.

Courts will not take judicial notice that the statutes of another state have changed the common law: *Tinkler v. Cox*, 68 Ill. 119; *Miller v. MacVeagh*, 40 Ill. App. 532. But where the jurisprudence of a state is not derived from the common law, as, for example, in Texas, it will not be presumed that the common law prevails in that state. In such a case, the rights of married parties will be determined by the law of the forum, in the absence of proof as to what the laws of Texas are: *Brown v. Wright*, 58 Ark. 20, 22 S. W. 1022. Much more is such a rule true where the presumption relates to a foreign country, such as Russia. There is no presumption that the common law is in force there: *Savage v. O'Neill*, 44 N. Y. 298. As to England, however, the rule is different: *Savage v. O'Neill*, 44 N. Y. 298; *King v. O'Brien*, 1 Jones & S. 49. The courts will take judicial notice of the fact that the common law is in force in that country: *Stokes v. Macken*, 62 Barb. 145.

In *Holthaus v. Farris*, 24 Kan. 784, where the parties were residents of Missouri at the time of their marriage, and the question arose as to the rights of the parties in certain land certificates, the court said that it would not assume that the law of Missouri differed from that of Kansas, "or that a court of equity in that state would fail to recognize and protect the equitable rights of a married woman to her separate property."

d. **Effect of Separation of Husband and Wife.**—Where husband and wife separate and live apart by consent, one in one state, the other in another, the wife acquires a domicile in the state where she lives, so that her personal property is governed by the laws of that state, and not by the laws of the state where her husband resides: *Matter of Florance*, 54 Hun, 328, 7 N. Y. Supp. 578. The abandonment of a husband by his wife, without justifiable cause, will, in Texas, cause her to forfeit all claim to a homestead owned by him at the time of his death: *Duke v. Reed*, 64 Tex. 705. The rights which a wife had under the laws of France are not lost by her abandonment by her husband who comes to this country, but will continue and attach to the property of the husband which he acquires after becoming domiciled here: *Bonati v. Welsch*, 24 N. Y. 157. And where a marriage contract is made in France, where the parties are domiciled, this may control the personal property acquired by the husband in New York after he has deserted his wife and come to this country. Though it seems that the wife might waive her contract and take under the laws of distribution of New York, the domicile of the decedent: *Decouche v. Savotier*, 3 Johns. Ch. 190, 8 Am. Dec. 478.

e. **Succession and Distribution.**—The descent of personal property or the right of succession thereto is governed by the law of the intestate's domicile: *Decouche v. Savotier*, 3 Johns. Ch. 190,

8 Am. Dec. 478; *Ennis v. Smith*, 14 How. 400; *Estate of Apple*, 66 Cal. 432, 6 Pac. 7; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41; *Vroom v. Van Horne*, 10 Paige, 549, 42 Am. Dec. 94; *Williamson v. Smart*, Conference Rep. 146, 2 Am. Dec. 638. This is true without regard to where the property is situated: *Holmes v. Remsen*, 4 Johns. Ch. 460, 8 Am. Dec. 581. This general rule is well settled. The law of the decedent's domicile will govern the distribution of his personal estate, although he dies in another state: *White v. Tennant*, 31 W. Va. 790, 13 Am. St. Rep. 896, 8 S. E. 596; *Johnson v. Copeland*, 35 Ala. 521. The allowance to a widow is determined by the law of the domicile of her husband: *Gilman v. Gilman*, 53 Me. 184. The personal property of a nonresident deceased married woman will be distributed according to the laws of her domicile: *In re Negus*, 27 Misc. Rep. 165, 58 N. Y. Supp. 377.

Special phases and exceptions to this general rule are all that we need notice, the general doctrine itself being universally recognized. Thus, where parties are married and domiciled in one state, where the wife acquires personal property, the husband's rights accruing therein are not changed (as we have seen) by removal to another state. Hence, if the wife dies after removal to another state, the rights of the husband in such personalty are governed by the laws of the first state: *Powell v. De Blane*, 23 Tex. 66. This is an apparent exception to the general rule stated above. But where personalty was bequeathed in one state to a wife and her husband domiciled there, and upon their death the property to go to the wife's heirs, if the parties remove to another state, where the wife dies, her heirs are ascertained by the laws of such state: *Price v. Tally*, 10 Ala. 946.

Care should be taken to discriminate between the descent and distribution of personal property, which are governed by the laws of the decedent's domicile, and the marital rights of husband and wife in such property to which they may have succeeded, which are determined by the laws of the matrimonial domicile. For example, if personal property descends or is bequeathed to a wife in one state, and the wife is domiciled with her husband in another state, the marital rights of husband and wife are governed by the laws of the latter state: *Kneeland v. Ensley*, Meigs, 620, 33 Am. Dec. 168. Hence, if, by the laws of the latter state, the property is the separate property of the wife, it will belong to her, whatever the laws of the decedent's domicile may be: *Muus v. Muus*, 29 Minn. 115, 12 N. W. 343. On the other hand, if the law of the matrimonial domicile gives to the husband all his wife's personal property, it will belong to him: *McLean v. Hardin*, 3 Jones Eq. 294, 69 Am. Dec. 740; *Hill v. Townsend*, 24 Tex. 575. A subsequent change of domicile will not alter the rights already acquired in the property: *Keyser v. Pilgrim*, 25 Tex. Supp. 218. Where personal property in

one state is bequeathed by a testator living there to a married woman domiciled in another, and the married woman dies, the distribution of such property is determined by the laws of the latter state, where the woman was domiciled: *Marcenaro v. Bertoli*, 2 La. Ann. 980.

That the law of the domicile prevails as to succession is true by reason of comity only, and where it is repugnant to the policy of the state where it is sought to be enforced, it will not prevail: *Mahorner v. Hool*, 9 Smedes & M. 247, 48 Am. Dec. 706. Where, as in the principal case, there is no law of the domicile which applies to the situation, the law of the place where the personal property is situated will control the distribution of a married woman's property. No doubt statute may change the general rule that the law of the domicile governs the descent and distribution of personal property. This seems to have been done in Illinois, so far as concerns personal property of a nonresident located in that state: *Cooper v. Beers*, 143 Ill. 25, 38 N. E. 61. And in Mississippi, when the nonresident dies intestate: *Slaughter v. Garland*, 40 Miss. 172.

III. Community Property.

a. **Effect of Nonresidence.**—So far as applies to personal property, acquired in a state where the law relative to community property prevails, if the parties were not married in such state, do not reside there, and did not contemplate residing there at the time of their marriage, such property is not community property, but is governed by the laws of the state where the parties are domiciled: *Succession of Packwood*, 9 Rob. (La.) 438, 41 Am. Dec. 341; *Armorer v. Case*, 9 La. Ann. 288, 61 Am. Dec. 209. And property purchased in such a state before a married couple remove there is not community property, although it was their intention to make such removal: *Huff v. Borland*, 6 La. Ann. 436. In Louisiana, where the law of community property prevails, prior to 1852, it seems that even real property acquired there by a nonresident was not community property under the laws of such state, but was governed by the law of the state where the parties were domiciled: *Leech v. Guild*, 15 La. Ann. 349; *Succession of Waterer*, 25 La. Ann. 210; *Succession of Packwood*, 12 Rob. (La.) 334, 43 Am. Dec. 230; *Armorer v. Case*, 9 La. Ann. 288, 61 Am. Dec. 209; *Conner v. Elliott*, 18 How. 591. But the community property act of Washington, which made lands purchased by the husband the common property of her husband and wife, was held to apply to property acquired by nonresidents: *Gratton v. Weber*, 47 Fed. 852. This would seem to be a correct construction of a statute relating to real property, the language of which was general. Where the husband makes his residence in a state where the community law prevails, the wife may claim a community interest in all real and personal property ac-

quired there, though she was married abroad and never went to such state to live: *Cole v. Executors*, 7 Martin, N. S., 41, 18 Am. Dec. 241; *Dixon v. Dixon*, 4 La. 188, 23 Am. Dec. 478.

b. Parties Married Outside the State.—If parties are married outside the state with the intention at the time of removing to a state where the community property law exists, and within a reasonable time thereafter such removal is made, the matrimonial rights of the parties are governed by the laws of the state to which they remove: *Fisher v. Fisher*, 2 La. Ann. 774; *Percy v. Percy*, 9 La. Ann. 185. But the mere intention to make such removal is not sufficient, if they actually take up their residence in another state: *Huff v. Borland*, 6 La. Ann. 436. The mere marriage outside the state, by a man whose domicile is in the state where the community law prevails, is immaterial, where he continues to reside there, although the wife has never resided in such state, since the domicile of the wife is that of the husband, and the community law will govern their property rights: *Succession of McKenna*, 23 La. Ann. 369. Where parties whose domicile was in Louisiana ran away and were married in a state where the common law prevails, with the intention of residing there, but actually return to and make their domicile in the first state, their conjugal rights are determined by law of such state, and upon the death of the wife her property descends according to those laws: *Le Breton v. Nouchet*, 8 Mart. 60, 5 Am. Dec. 736.

c. Effect of Removal to or from a State Where the Common Law Prevails.—Rights acquired by husband or wife in personal property while domiciled in one state are not changed or lost by removal to another state. This rule has been noted elsewhere. The same doctrine prevails where the removal is from a common-law state to a state where the community property law exists, or where the removal is from the latter state to the former: *Succession of Packwood*, 9 Rob. (La.) 438, 41 Am. Dec. 341; *Routh v. Routh*, 9 Rob. (La.) 224, 41 Am. Dec. 826; *Succession of Packwood*, 12 Rob. 334, 48 Am. Dec. 230; *Saul v. Creditors*, 5 Martin, N. S., 569, 16 Am. Dec. 212. Thus, where a married man removed to Louisiana from a common-law state, it will be presumed that all personal property brought with him belonged to him: *Penny v. Weston*, 4 Rob. (La.) 165; *Martin v. Boler*, 18 La. Ann. 369; *Slocumb v. Breedlove*, 8 La. 143, 28 Am. Dec. 135. And where personal property acquired in one state belongs to the husband, it does not become community property after the parties remove to a state where that law prevails; and this is true though it is subsequently invested in real estate in the latter state: *Kraemer v. Kraemer*, 52 Cal. 302. The laws of the new domicile, however, will govern property rights in property acquired after removal: *Saul v. Creditors*, 5 Martin, N. S., 569, 16 Am. Dec.

212; *Allen v. Allen*, 6 Rob. (La.) 104, 39 Am. Dec. 553; *Succession of Packwood*, 12 Rob. (La.) 334, 43 Am. Dec. 230; *Dow v. Gould etc. Min. Co.*, 31 Cal. 629. The laws of the original domicile cease upon removal to another state, so far as after-acquired property is concerned: *Succession of Packwood*, 9 Rob. (La.) 438, 41 Am. Dec. 341.

d. **Effect of Marriage Contract.**—Parties may, by a marriage contract, provide that their property rights shall be regulated in a certain manner, wherever they may be domiciled, and such contract will be their law, if it is not incompatible with the laws of the state where they reside, and if it does not injuriously affect the rights of the citizens of such state: *Murphy v. Murphy*, 5 Martin, 83, 12 Am. Dec. 475. This will be more fully discussed under “Marriage Settlements.”

e. **Change in Law.**—Property acquired before a change in the law is governed by the law as it existed before the change was made. Thus, where property is acquired by a husband prior to any legislation regarding community property, and which became his separate property, remains his, and subsequent legislation does not deprive him of his rights previously acquired therein: *Seeber v. Randall*, 102 Fed. 215. And community property rights acquired by a wife under the law cannot be taken away or destroyed by subsequent legislation: *Dixon v. Dixon*, 4 La. 188, 23 Am. Dec. 478. Property acquired after a community law is passed is governed by such law, and is community property: *Jacobson v. Bunker Hill etc. Co.*, 2 Idaho, 863, 28 Pac. 396.

IV. Right to Contract.

a. *Lex Loci Contractus.*

1. **Governs Generally.**—The validity of a contract made by a married woman is usually determined by the law of the state where it is made: *Nixon v. Halley*, 78 Ill. 611; *Hauck etc. Co. v. Sharpe*, 83 Mo. App. 385; *Griswold v. Golding*, 8 Ky. Law Rep. 777, 3 S. W. 535; *First Nat. Bank v. Mitchell*, 92 Fed. 565. If it is valid where made, it will be enforced in another state against property situated there: *Young v. Bullen*, 19 Ky. Law Rep. 1561, 43 S. W. 687. Thus, a note signed by a married woman in Missouri, but to be paid to her son in Indiana, is a Missouri contract, to be governed by the laws of that state, and will be enforced, though if made in Indiana it would have been void: *Hauck etc. Co. v. Sharpe*, 83 Mo. App. 385. A note made by a married woman in Georgia for the payment of her husband's debts is void by the statutes of that state, even in the hands of a bona fide holder, and will not be enforced: *March etc. Co. v. Clark*, 9 Fed. 753. If the contract of a married woman is void or illegal by the law of the place where it is made, it will be deemed void everywhere, and cannot be enforced, what-

ever the law may be, where it is sought to be enforced. Hence, where a contract made in Missouri imposes no personal obligation on a married woman, it will not be enforced in another state where a personal liability may be assumed: *Griswold v. Golding*, 8 Ky. Law Rep. 777, 3 S. W. 535.

If the contract is made in one state, to be wholly performed in another state, its validity and enforceability will generally be determined by the law of the latter state: *Griswold v. Golding*, 8 Ky. Law Rep. 777, 3 S. W. 535. It would seem, however, that this rule is not true unless the contract can be deemed to have been made in the latter state: See *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241. In these two cases the married woman was domiciled in Massachusetts and signed the contracts in that state, but they were sent to Maine, where they were to be performed, and where the courts held the contracts were made, and while, by the laws of Massachusetts, the contracts would have been void, yet being valid in Maine, where they were considered as being made, the courts enforced them. In the Maine case the court says that even if there could be any doubt about the contract being a Maine contract, yet it would hold that its validity must be determined by the Maine laws, "on the ground that no contract must be held as intended to be made in violation of the law, whenever, by any reasonable construction, it can be made consistent with the law, and which it was competent for the parties to adopt." So that if, by the laws of one of the states, it is competent for the married woman to make the contract, it will be upheld, and its validity determined by the laws of that state, if, by any possibility, the contract can be considered as made in such state. The law of the place of performance does not govern, apparently, unless the contract was made with special reference to such law. Thus, when a note was signed in Missouri and valid by its laws, but was sent to Indiana, where it was to be paid, and by which laws it would be invalid because made by a married woman, it was held to be a Missouri contract and enforceable: *Hauck etc. Co. v. Sharpe*, 83 Mo. App. 385. In this case the court said: "The law of the place of performance does not in any way affect the capacity of a married woman to contract in a state which authorized her to make the contract, unless made with reference to real estate situated in the state of performance, or it is apparent from the terms of the contract that the parties intended to incorporate the laws of the state of performance in the contract." The concurring opinion of Judge Biggs shows that the contract was actually made in Missouri, and for that reason must be governed by its laws. We are not here concerned with the rules which determine where a contract is made. But if a contract is actually made in one state by a married woman, the laws of that

state determine the validity of the contract. *Freeman's Appeal*, 68 Conn. 533, 57 Am. St. Rep. 112, 37 Atl. 420, enunciates a contrary doctrine, but is seemingly opposed to the great weight of authority. See later comments on this case. In this case a guaranty was made in Connecticut to be used in Illinois. The court, while apparently admitting that the guaranty was an Illinois contract, refused to enforce it in accordance with the Illinois laws, the married woman being domiciled in Connecticut, by the laws of which state she had no legal capacity to contract. Upon precisely similar facts between the same parties, the United States circuit court of appeals, sitting in Connecticut, enforced the same married woman's agreement as being a valid contract under the laws of Illinois, where the contract was held to be made: *First Nat. Bank v. Mitchell*, 92 Fed. 565. *Buckingham v. Hurd*, 52 Conn. 404, seems to be another Connecticut case which refused to determine the liability of the wife for the purchase of goods by the law of the place where they were bought and delivered. In *Voigt v. Brown*, 42 Hun, 394, a married woman domiciled in New York signed an accommodation note in Connecticut, but it was discounted in New York. The court held that until it was delivered to the plaintiffs and discounted, it had no inception, and hence was made in New York, by whose laws its validity must be determined. In *Baum v. Birchall*, 150 Pa. St. 164, 30 Am. St. Rep. 797, 24 Atl. 620, a bond was signed by a married woman in Pennsylvania, but did not take effect until delivered in Delaware, and the Delaware laws were held to govern its validity, and would be enforced in Pennsylvania in accordance therewith. But though a contract is valid in the state where it is to be performed, it will not be enforced in the courts of another state, if it is condemned by the positive law of such state, or is opposed to the public policy thereof as declared by state statutes: *Thompson v. Taylor*, 65 N. J. L. 107, 46 Atl. 567.

2. **Effect of Domicile.**—Some of the cases lay down the rule that the capacity of a married woman to contract must be determined by the law of the domicile. This rule is not universally true, however, Foreign jurists, as stated by Story, hold that the capacity of persons to contract ought to be governed by the law of the domicile, but that the common-law doctrine is different, holding that the *lex loci contractus* should govern: Story on Conflict of Laws, secs. 103, 241. Perhaps influenced by the foreign jurists, the supreme court of Louisiana held, in *Roberts v. Wilkinson*, 5 La. Ann. 369, that the capacity of a married woman domiciled there to make a contract to be executed in another state must be determined by the laws of Louisiana. Of course, if the contract was of such a nature that the court must hold that it was made in that state, then it was a Louisiana contract, and would be governed by its laws. This because

of the rule already noted that the law of the place of the contract controls the capacity of the parties to make it.

Several situations may present themselves in the case of a contract made by a married woman. The contract may be made by her at her domicile to be performed there; it may be made at the same place to be performed in another state; it may be made outside of her domicile to be performed there, or outside her domicile to be performed within the state of her domicile. Obviously, in the first situation mentioned the contract will be governed by the law of the domicile, and if it is valid there it will generally be deemed valid elsewhere: *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681. Such contract will be enforced in the courts of another state, notwithstanding the disabilities of coverture still exist there: *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. Rep. 690, 11 S. W. 88. Comity between the states requires that such contracts should be enforced: *Gibson v. Sublett*, 82 Ky. 596. That contracts made by a married woman at her domicile and to be performed there will be enforced anywhere if valid by the law where made, see, further, *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180, where the contract, made in Illinois where it was valid, was enforced in New Jersey; *Waldron v. Ritchings*, 9 Abb. Pr., N. S., 359, where the contract was held to have been made in Pennsylvania, where it was not valid, and would not, therefore, be enforced in New York; *Bradley v. Johnson*, 46 N. J. L. 271, where the contract, made in New York, was not shown to be valid there, and for this reason was not enforceable in New Jersey; and *Holmes v. Reynolds*, 55 Vt. 89, where the wife contracted for the purchase of merchandise in Massachusetts, and her liability was enforced in Vermont. The assignment of an insurance policy made by a married woman domiciled in New York is governed by the laws of that state where it was made, though the insurance company is a corporation of another state where the insurance contract was made: *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651. And the validity of a transfer or pledge of corporate stock by a married woman is determined by the law of the woman's domicile where the transfer or pledge is made, wherever the corporation may be organized: *Union Nat. Bank v. Hartwell*, 84 Ala. 379, 4 South. 156; *Hill v. Pine River Bank*, 45 N. H. 800. Such a transfer will be enforced if made in accordance with the law of the married woman's domicile. *Hayden v. Stone*, 13 R. I. 106, appears to be in conflict with these decisions, the court holding that "a contract valid by the laws of one state cannot be enforced in another, unless such a contract made between its own citizens could be enforced there, or, in other words, it depends on the *lex fori*."

The mere fact that a contract is to be performed outside the domicile where it is made will not of itself render it invalid, if the married woman who made it had such power in the state of her domicile where the contract was made: *Hauck etc. Co. v. Sharpe*, 83 Mo. App. 385. Thus, a note executed by a married woman in New York and made payable in Maryland will be governed by the laws of New York: *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138. But if the contract is not finally executed in the state of her domicile, and it is not a binding obligation until some act remains to be done outside the state, the law of the latter state will control, and determine the validity and enforceability of the contract: *Baum v. Birchall*, 150 Pa. St. 164, 30 Am. St. Rep. 797, 24 Atl. 620. Though a contract is made in one state, if it is apparent from its terms that the parties intended to incorporate the laws of the state of performance in it, such contract will be governed by the laws of the place where it is to be performed: *Hauck etc. Co. v. Sharpe*, 83 Mo. App. 385.

If a contract is made by a married woman in a state not her domicile, its validity in that state will naturally be determined by the laws of such state under the ordinary rule that the *lex loci contractus* governs. The chief difficulty arises where a married woman makes a contract in a state other than that of her domicile, and the contract is sought to be enforced against her elsewhere, and especially in the state of her domicile. The contract, if valid where made, is generally binding elsewhere, notwithstanding that by the law of her domicile she was at the time incapacitated from making such a contract. The cases sustain this general statement of the rule: *First Nat. Bank v. Mitchell*, 92 Fed. 565; *Bowles v. Field*, 78 Fed. 742; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Armstrong v. Best*, 112 N. C. 59, 34 Am. St. Rep. 473, 17 S. E. 14. The only real conflict of authority occurs where the contract is made by a married woman outside of her domicile, where it would be valid, and it is sought to be enforced within her domicile, by whose laws the contract would be void because of her coverture. In *First Nat. Bank v. Mitchell*, 92 Fed. 565, the United States circuit court of appeals lays the rule down in express terms, that if the contract is valid where made it will be enforced everywhere, even in the state of the woman's domicile, notwithstanding by the laws of such state she had no capacity to contract. This case is in direct conflict with and criticises *Freeman's Appeal*, 68 Conn. 533, 57 Am. St. Rep. 112, 37 Atl. 420, where the same facts between the same parties were involved. The cases cited in *First Nat. Bank v. Mitchell*, 92 Fed. 565, to sustain its decision, it seems to us are more limited in their application than is asserted by this case. For example, in the case of *Milliken v. Pratt*, 125 Mass. 374, 28 Am.

Rep. 241, the contract was made in Maine by a married woman domiciled in Massachusetts, at which time she was not capable of making it by the Massachusetts law, but it was valid in Maine. When the contract was sought to be enforced, however, the Massachusetts law did permit the making of such a contract; hence its enforcement was not opposed to the public policy of the state, though at the time the contract was made it would have been. Even this case, which seems to be a leading one, and which is cited in most of the later cases in that state and elsewhere, recognizes that where the incapacity of a married woman is "the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." The court sustained the action because there was no reason of public policy in Massachusetts which would prevent its maintenance. We believe the better considered cases in general go no further than this—namely, that if the contract is void by the law of the married woman's domicile and opposed to the settled public policy of such state, the courts of the domicile will not enforce it, notwithstanding it was valid where made. The comity of a state does not go to the extent of enforcing rights prohibited by its laws. In *Bowles v. Field*, 78 Fed. 742, the law of the domicile where suit was brought did not prohibit a married woman from executing a note or mortgage for which she was personally liable. Hence, no public policy of the state was violated. In *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251, the law of the domicile sanctioned the making of the contract. This was true, also, in *Brigham v. Gilmartin*, 58 N. H. 346. *Armstrong v. Best*, 112 N. C. 59, 34 Am. St. Rep. 473, 17 S. E. 14, contains an excellent statement of the limitations of the rule: "The general current of English and American authorities is in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not under the law of the domicile be deemed capable of making it. The proposition seems to be generally accepted in this country in so far as it relates to the enforcement of contracts in courts other than those of the domicile. If, for example, the plaintiffs were suing upon the present contract in the courts of Maryland, the defendant could not, it is thought, avail herself of the incapacity of her domicile, but the *lex loci contractus* would prevail. But quite a different question is presented when the action is brought in the forum of the domicile. In such a case, a very important qualification of private international law is to be considered, and this is, that no state or nation will enforce a foreign law which is contrary to its fixed and settled policy. In *Bank of Augusta v.*

Earle, 18 Pet. 519, Chief Justice Taney, speaking for the court, said: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible where contrary to its policy, or prejudicial to its interests." To the same effect is the language of Story—that no state will enforce a foreign law if it be 'repugnant to its policy or prejudicial to its interests': Story on Conflict of Laws, 37." And the court applied the doctrine to the contract of a married woman made in Maryland, which was sought to be enforced against her at the place of her domicile, where the contract was void. The same rule was approved and followed in *Hanover Nat. Bank v. Howell*, 118 N. C. 271, 23 S. E. 1005. This limitation on the rule was recognized in *Case v. Dodge*, 18 R. L. 681, 29 Atl. 785, where a contract made in Massachusetts was enforced against a married woman in Rhode Island, the law of the latter state having been changed since the contract was entered into, allowing married women to make contracts. In *Thompson v. Taylor*, 65 N. J. L. 107, 46 Atl. 567, a contract was made in New Jersey to be performed in New York. By the law of the state of its performance it was valid, but since it was condemned by the positive law of the state of the woman's domicile, the court refused to enforce it. If a married woman's contract is valid by the law of her domicile where it is made, she cannot rid herself of liability thereon by a mere change of residence to a state where a married woman is prohibited from contracting: *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138.

3. Change in Law.—A contract of a married woman void when made will not be made valid by a change of law authorizing her to contract. And the mere recognition of such contract after the law has been changed will not of itself render her liable thereon: *Mercantile Co. v. Bowers*, 105 Tenn. 138, 58 S. W. 287. Prior to any married women's acts, a restraint in a will placed upon a married woman that she should have no power to alienate or anticipate her income from a trust fund was valid. Such a restraint or alienation, while not valid generally, was valid as to married women, equity making an exception in their favor. A change in the statutes of a state by which a married woman was empowered to contract as though she were single will not, it seems, have the effect of abolishing this exception in her favor, and of placing her within the general rule of the state which makes invalid such restrictions on the power to anticipate or charge future income: *Hunter v. Conrad*, 94 Fed. 11. Where a married woman acquired property by inheritance in California before its transfer to the United States, her power to contract concerning it is governed by the law as it then was, and not by the state act of April

17, 1850, defining the rights and duties of husband and wife: *Racoullat v. Sansevain*, 32 Cal. 376.

b. Binding Separate Estate.—The liability of the separate real estate of a married woman to be subjected to the payment of claims against her is governed by the law of the state where the property is situated: *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587. See *Spearman v. Ward*, 114 Pa. St. 634, 8 Atl. 430. Hence, if a married woman is in one state treated as a feme sole as to her separate real estate situated there, her capacity to make a contract and its validity, when it is sought to enforce it against such separate estate, is governed by the laws of that state, wherever the contract may have been made: *Johnston v. Gantry*, 11 Mo. App. 322, affirmed on appeal in 83 Mo. 339; *Read v. Brewer* (Miss.), 16 South. 350. It has, therefore, been held that where a married woman, who is domiciled in one state by the laws of which she has no power to contract, makes a contract for the improvement of or which is to be a charge upon her separate real estate situated in another state, the laws of the latter state apply as to her capacity to contract and her power to charge such separate estate: *Shacklett v. Polk*, 51 Miss. 378. Thus, where a promissory note was made by a wife as surety for her husband, in Louisiana, where she resided, and which was void by the law of that state, it may nevertheless be enforced against her separate real estate situated in Mississippi, if she contracted with reference thereto, and intended to charge it with the debt: *Frierson v. Williams*, 57 Miss. 451. A married woman domiciled in a state where she cannot bind herself personally by contract but may charge her separate estate, cannot while temporarily in another state enter into a contract which will be enforced against her personally at her domicile, though it may be enforced against her separate estate: *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319. A personal contract valid and enforceable where made will support a judgment in another state subjecting after-acquired separate property, where the disabilities of married women have been removed by statute: *Toof v. Brewer* (Miss.), 3 South. 571. In *Merrielles v. State Bank*, 5 Tex. Civ. App. 483, 24 S. W. 564, the Texas courts sustained an action against a married woman upon a note made in another state where it was valid, and enforced it against her separate property in Texas. The report of the case is brief, but in so far as it seems to hold that a married woman's separate real estate situated in one state is subjected to liability under a contract made in another state according to the laws of the latter state, it would appear to conflict with the current of authority elsewhere. Where a statute of a state imposes a certain liability upon married women, which can only be enforced by the methods provided in the act itself, such liability will not be enforced in

another state, where such methods are foreign to its judicial procedure: *Hinkinson v. Williams*, 41 N. J. L. 35.

V. Contracts Between Husband and Wife.

a. **Generally.**—The validity of a contract between husband and wife is generally determined by the law of the place where it is made, and if valid there it is valid everywhere. Thus, a contract between husband and wife made in Louisiana and valid by its laws, will be enforced in Pennsylvania against the husband's executors: *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 520. Where a wife purchased a horse from her husband in New Brunswick, by the laws of which she could not acquire title from him by purchase, the horse is still the property of the husband and may, in Maine, be attached for his debts: *Bond v. Cummings*, 70 Me. 125. A transfer of property between husband and wife, if good where made, remains good upon their removal to another state: *Walker v. Marselles*, 70 Miss. 283, 12 South. 211. If a husband advances money to his wife in New Jersey upon her promise of repayment, a claim made after her death to recover the amount from her estate in New York is to be determined by the New Jersey law: *Hendricks v. Isaacs*, 46 Hun, 239. This rule that the place of the contract should control was carried to probably its extreme limits in *Polson v. Stewart*, 167 Mass. 211, 57 Am. St. Rep. 452, 45 N. E. 737, where a husband covenanted with his wife in North Carolina, where they were domiciled, to surrender all his rights in land owned by her in Massachusetts. The court held that the covenant might be specifically enforced in Massachusetts, if the wife had a right to contract with her husband by the law of North Carolina. This case has already been noticed in treating of rights in real estate.

b. Marriage Settlements.

1. **By What Law Construed.**—The law of the place where a marriage contract is made and where the parties reside govern the rights of the parties thereunder: *Decouche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478; *Lafitte v. Lawton*, 25 Ga. 305; *Carroll v. Renich*, 7 Smedes & M. 798; *Richardson v. De Giverville*, 107 Mo. 422, 28 Am. St. Rep. 426, 17 S. W. 974; *Davenport v. Karnes*, 70 Ill. 465.

Thus, a marriage contract made in Tennessee, where the parties reside, will be construed in Mississippi according to the laws of Tennessee: *Carroll v. Renich*, 7 Smedes & M. 798. So of a South Carolina contract in Georgia: *Lafitte v. Lawton*, 25 Ga. 305. And where a marriage settlement is made in France, the husband abandoning the wife and settling in New York, the courts of the latter state will administer French law: *Decouche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478. But if, at the time the marriage

contract is made in a foreign country, as in France, the wife owned real property situated in another state, as in Missouri, the contract, so far as it relates to such realty, will be construed by the law of the state where it is situated: *Richardson v. De Giverville*, 107 Mo. 422, 28 Am. St. Rep. 426, 17 S. W. 974. If a resident of one state is married in another, where a marriage contract is made, and the parties immediately return to the first state to reside and where the contract is to be performed, the laws of such state will govern the validity and effect of the contract, and not those of the state where it was made: *Davenport v. Karnes*, 70 Ill. 465. Though in *Succession of Wilder*, 22 La. Ann. 219, 2 Am. Rep. 721, the capacity of the parties to enter into the contract was held to depend on the law of the state where it was made, while its effect was to be governed by the law of the state where the parties intended to reside, and where it was to be performed. In *McVey v. Holden*, 15 La. Ann. 317, the parties were married, domiciled, and acquired slaves in Louisiana, and removed for a time to another state, where they entered into a post-nuptial contract respecting such slaves, and then returned to the first state, where they continued to reside until the wife's death. It was held that the rights of the parties were to be determined by the Louisiana law, and the post-nuptial contract disregarded.

The construction of a marriage settlement depends upon the law as it stood when the contract was executed: *Fleming v. Fountain*, 78 Ga. 575. Hence where by an ante-nuptial settlement a husband reserved to himself the right to manage and control certain property as trustee in accordance with the terms of a particular statute, the subsequent repeal of the statute will not affect his rights: *Memphis etc. R. R. Co. v. Bynum*, 92 Ala. 335, 9 South. 185.

Parties may by marriage contract stipulate that their rights shall be governed by the laws of the place where they reside, even if they remove elsewhere. But such a contract, while generally good as between the parties, will not prevail as against heirs who claim an interest in the property after removal to another state and subsequent death of one of the spouses: *Murphy v. Murphy*, 5 Mart. 83, 12 Am. Dec. 475. Marriage settlements will be upheld in other states than those where they are made, provided they do not cause prejudice to the citizens of a country where they go to reside, and their execution is not incompatible with the laws of that state: *Murphy v. Murphy*, 5 Mart. 83, 12 Am. Dec. 475. Such settlements will be good in other states in so far as they do not create prohibited substitutions, or new tenures of property unknown to the laws of those states: *Sherrod v. Callegan*, 9 La. Ann. 510. A marriage contract executed abroad will, so far as

it relates to the sale of real property in another state, be construed according to the laws of the latter state: *Heine v. Mechanics' etc. Ins. Co.*, 45 La. Ann. 770, 13 South. 1. If a mortgage, executed by husband and wife in one state, where they reside, is valid, the wife cannot defeat it by setting up a marriage contract, made in another state, by which the parties agreed that their property rights should be governed by the laws of such state: *Lapice v. Gereauden*, Walk. Ch. 480. Thus, it seems that the rights of heirs or of innocent third parties cannot be prejudiced by a marriage settlement executed in another state.

2. **Effect of Change of Domicile.**—We have already noticed that a marriage settlement, if valid by the law where it is made, will generally be valid everywhere: *Scheferling v. Huffman*, 4 Ohio St. 241, 62 Am. Dec. 281. Its validity is in no manner affected by the removal of the parties to another state: *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563; *Sherrod v. Callegan*, 9 La. Ann. 510; *Rochereau v. Jonau*, 11 La. Ann. 598; *De Lane v. Moore*, 14 How. 258; *Saul v. His Creditors*, 5 Martin, N. S., 569, 16 Am. Dec. 212.

The parties may by their marriage contract provide that their property rights, present as well as future, shall be governed by certain laws, and their agreement will be enforced wherever they may reside, if not repugnant to the laws of the state where it is sought to be enforced. Hence, where the parties contract that their property rights shall be determined by the laws of one state, and if they remove to another state that their future acquisitions shall still be regulated by the same law, property acquired after a change of domicile will be governed by the laws of the former state: *McLeod v. Board*, 30 Tex. 238, 94 Am. Dec. 301. A marriage contract made in France and providing that the property rights shall be regulated by the French law, will be enforced in Missouri, so far as the rights relate to personal property: *Richardson v. De Giverville*, 107 Mo. 422, 28 Am. St. Rep. 426, 17 S. W. 974. And a contract made in New York by French citizens, which was made with reference to the French law and to an intended residence in that country, providing that the interests in property which they then had, or which they might thereafter acquire, should be regulated by the laws of France, will be construed in New York according to the French law as it existed at the time of the marriage: *Le Breton v. Miles*, 8 Paige, 261. A marriage contract may even determine the laws by which the rights of the parties in real property subsequently acquired shall be governed: *Rochereau v. Jonau*, 11 La. Ann. 598. Though on this point doubt was expressed in *Le Breton v. Miles*, 8 Paige, 261. And in *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277, the court, quoting from *Story on Conflict of Laws*, held that as to

real property in a foreign territory, a marriage contract would, at most, confer only a right of action to be enforced according to the jurisprudence of the place where the property was situated. To the same effect is *Besse v. Pellochoux*, 73 Ill. 285, 24 Am. Rep. 242.

According to the weight of authority in this country, a marriage contract will not follow the parties wherever they may remove so as to govern their future acquired property in the new domicile, unless the agreement was made with reference to such law, or in view of a change of domicile, or unless the intention of the parties is made manifest in some way by the contract that it should govern their future property rights, wherever they might reside: *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277. Thus, in *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180, where the parties were married and resided in Prussia, a contract entered into respecting their property, which in terms only applied to present property, was held not to govern their rights in future acquisitions of property in Wisconsin made after they had changed their domicile. The law of their new domicile governed such property rights. And in *Besse v. Pellochoux*, 73 Ill. 285, 24 Am. Rep. 242, where an ante-nuptial agreement was made in Switzerland in regard to property to be acquired during marriage, and it appeared that no change of domicile was contemplated, it was held that the contract did not apply to real estate acquired in Illinois by the husband after their emigration. In *Decouche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478, the contract, made in France, provided that their property rights should be regulated according to the custom of Paris, "which," it expressly stated, "is to govern the disposition of the property, though the parties should hereafter settle in countries where the laws and usages are different or contrary," and the French law was consequently applied. *Long v. Hess*, 154 Ill. 482, 45 Am. St. Rep. 143, 40 N. E. 335, relating to a marriage contract made in Germany by parties who subsequently removed to Illinois, contains an elaborate discussion of this question and a full review of the authorities, and the court reached the conclusion that if an ante-nuptial contract is entered into between parties living in a foreign country, which does not purport on its face to provide respecting acquisitions to be made by them after their marriage, such acquisitions, if made in this country, will be controlled by its laws, and be in no respect affected by the ante-nuptial contract.

VI. Capacity to Sue and be Sued.

While the liability of a married woman on a contract is generally determined by the law of the place where the contract is made, all matters relating to the remedy merely are determined

by the law of the place where the suit is brought: *Evans v. Cleary*, 125 Pa. St. 204, 11 Am. St. Rep. 886, 17 Atl. 440. Hence, a person who sues a married woman is entitled to such remedies only as are afforded by the *lex fori*: *Ruhe v. Buck*, 124 Mo. 178, 46 Am. St. Rep. 439, 27 S. W. 412. And the right of a married woman to sue in the courts of one state depends upon the law of such state and not upon the law of the state where she is domiciled: *Johnson v. Huber*, 34 Ill. App. 527; *Stoneman v. Erie Ry. Co.*, 1 Buff. Super. Ct. (N. Y.) 286. Thus, an action by a married woman to recover for personal injuries, brought in a state where the injuries arose, is governed by the laws of such state as to her right to sue and the damages recoverable, regardless of the laws of the state of her domicile: *Texas etc. Ry. Co. v. Humble*, 97 Fed. 837.

REED v. LOWE.

[163 Mo. 519, 63 S. W. 687.]

EXECUTIONS—JUDGMENT OF JUSTICE'S COURT—PREMATURE RETURN.—Under a statute prohibiting the issuance of an execution out of the circuit court on a transcript judgment of a justice's court, until an execution has been issued by the justice and returned *nulla bona*, at the expiration of ninety days, an execution returnable in eighty-eight days is premature, and will not support a sheriff's sale and deed under an execution out of the circuit court. (pp. 581, 582.)

EXECUTIONS—PREMATURE RETURN—EFFECT.—When the time is fixed by law for the return of an execution, its return at a prior date is not only premature and irregular, but is insufficient to support further proceedings resting thereon. (p. 582.)

EXECUTIONS—RETURN—WHAT SHOULD STATE.—An execution returned "not served for want of property" is insufficient under a statute requiring the return to state "that the defendant had no goods or chattels whereof to levy the same." (p. 583.)

PRESUMPTIONS—OFFICER DOING DUTY—FACTS NOT PRESUMED.—While the law will presume that an officer has done a duty which the law casts upon him, it will not presume that a fact exists which the statute requires to exist in order to give the officer power to act, and without which he is prohibited from acting. (p. 584.)

EXECUTION SALE—JUSTICE'S JUDGMENT—BURDEN OF PROOF.—In an execution sale on a transcript judgment from a justice's court, where the judgment debtor is a resident of the county, the burden is on the party claiming under the sheriff's deed to show that an execution had been issued by the justice and returned *nulla bona*, at the expiration of ninety days before an execution could be issued by the clerk of the circuit court. (p. 584.)

EXECUTION — RECITALS IN — RETURN — JUSTICE'S JUDGMENT.—A recital in an execution issued by the circuit clerk on a transcript judgment of a justice of the peace, that an execution had been issued by the justice, and returned that the defendant had no goods or chattels whereof to levy the same, is not evidence of these facts. (p. 535.)

ACTION TO SET ASIDE DEED — DISMISSAL.—THE PENDENCY OF A PARTITION SUIT for the same land involved in an action to set aside a sheriff's deed is no ground for a dismissal of the latter suit. (p. 585.)

LIMITATION OF ACTIONS—REVERSION.—The statute of limitations does not begin to run against a reversioner until the death of the life tenant. (p. 585.)

H. T. Herndon and Wilton & Hughes, for the appellant.

Turney & Goodrich and W. S. Herndon, for the respondent.

⁵²⁶ **ROBINSON, J.** This is a direct proceeding by bill in equity, instituted in the Clinton circuit court on April 29, 1898, to set aside a sheriff's sale and deed to five hundred and twenty acres of land in Clinton county, Missouri, made in April, 1875, under an execution issued upon a transcript of a judgment obtained before a justice of the peace.

The land in controversy was a part of the home farm of John Reed, deceased, late of Clinton county, who died intestate in 1861, owning said land, together with a large amount of other land, and leaving surviving him the plaintiff and four other children and his widow, Mary Reed. On the settlement of his estate, the land in question was set off to the widow, giving her a life estate therein, with reversion to the children, each ⁵²⁷ an undivided one-fifth. By the death of his two brothers, Cyrus and James Reed, the plaintiff's interest was increased from one-fifth to three-tenths.

On February 13, 1873, Eli M. Lyons, J. W. Winn, and William H. Comer, obtained a judgment against the plaintiff for one hundred and forty-three dollars and two cents, before Thomas F. Viglini, a justice of the peace, within and for Concord township, in Clinton county, and on the same day the justice issued an execution on said judgment, returnable on the twelfth day of May, 1873, in eighty-eight days from its date. On May 12, 1873, the execution was returned, "Not served for want of property."

On December 14, 1874, a transcript of said judgment showing the issuing of execution, and return of the constable as above stated, was filed in the office of the clerk of the circuit court of said county signed, "Alex. McWilliams, justice of the peace,"

who certifies that "the foregoing is a complete transcript of all proceedings had before Thomas F. Viglini, in the above-entitled cause, as taken and copied from his docket." And on December 16, 1874, an execution was issued upon such transcript judgment from the office of the circuit clerk, directed to the sheriff of said county. This execution, which is a printed form, recites that an execution had been issued by the justice of the peace and returned, "Not satisfied, no goods or chattels being found whereon to levy the same." On the sixteenth day of December, 1874, the sheriff levied upon plaintiff's undivided interest in the reversion in the five hundred and twenty acre tract, and also his right, title, interest, and estate in sixty-seven acres of land situate in the same county, and sold the same on the twenty-seventh day of April, 1875, during the sitting of the circuit court of said county, for thirty-three dollars, to the defendant, who received a sheriff's deed therefor. This deed recited that on the thirteenth day of February, 1873, Eli M. Lyons and others obtained a judgment before Thomas F. Viglini, a justice of the ~~528~~ peace of Concord township, in Clinton county, against the plaintiff for one hundred and forty-two dollars and two cents, as appears from a transcript of said judgment, filed in the office of the clerk of the circuit court of said county, on the fourteenth day of December, 1874, upon which transcript of judgment an execution issued from the clerk's office of said court, in favor of Eli M. Lyons et al., and against Daniel Reed, directed to the sheriff of said county, and delivered to him on the same day, by virtue of which on that date he levied upon and seized all the right, title, interest, and estate of plaintiff in said land. The deed was duly acknowledged, and filed for record in the recorder's office on the twenty-seventh day of July, 1875.

The sheriff's deed, it will be observed, makes no recital of the issue of the execution by the justice of the peace, and a nulla bona return thereon by the constable. At the time of such sale the plaintiff owned a present interest of one undivided fourth in the sixty-seven acre tract, an undivided three-tenths interest in the remainder of the five hundred and twenty acres, subject, however, to the life estate of his mother, to whom the same had been assigned as her dower. The plaintiff's reversionary interest in the latter tract was worth, at the time of defendant's purchase, about three thousand dollars.

In February, 1898, Anna M. Reed commenced a suit in the Clinton circuit court, to partition the land in question, making the parties to this suit defendants therein, alleging, as a reason

therefor, their adverse claims of title thereto. The court ascertained the rights of the other parties to the suit, and made partition among them accordingly, but in view of the present controversy, and to avoid complicating matters, declined to consider or determine the conflicting claims of the parties to the suit, and suspended all further proceedings in the partition suit, so far as plaintiff and defendant were concerned ⁵²⁹ until the determination of this controversy.

At the time of the rendition of the judgment and the issuance of execution by the circuit clerk, and sale by the sheriff, the plaintiff was a resident of Clinton county. The doweress, Mary Reed, resided on the land until her death, which occurred in February, 1898, and plaintiff lived with her most of the time. After her death, plaintiff, being in possession, brought this suit to set aside the sheriff's deed as a cloud on his title.

Plaintiff's petition asks that the sheriff's sale be set aside, and the deed to defendant be declared void for the following reasons:

1. Because the execution issued from the office of the circuit clerk was void, and was issued without authority of law in this, that the transcript of the judgment rendered by the justice, filed with the clerk of the circuit court, and upon which such execution was issued, was not certified as required by law. And, further, that such transcript shows that the execution, issued by the justice of the peace, was not made returnable ninety days after date, but eighty-eight days after date, and was returned by the constable eighty-eight days after the date thereof, instead of ninety, as required by law, and because said execution was not returned by the constable "not satisfied, no goods or chattels being found upon which to levy the same."

2. Because the price paid was so grossly inadequate as to shock the moral sense.

The answer was: 1. A general denial; 2. Avers the regularity of all the proceedings leading up to the sale, and that defendant was a bona fide purchaser thereat, and defendant's claim of title, and plaintiff's insolvency at date of sale; 3. The pending, before this suit was instituted, of a partition suit, in which the same issue was involved, and could be ⁵³⁰ tried; 4. The statute of limitations. The reply was a general denial.

The court below found the issues for plaintiff, and rendered a decree, setting aside the sheriff's sale, and the deed made to defendant, in pursuance thereof, so far as the same attempted

to convey the plaintiff's undivided interest in remainder in the five hundred and twenty acre tract, and defendant appealed.

The controlling question in this case is, whether the execution issued by the justice of the peace, and made returnable in eighty-eight days, instead of ninety, and returned by the constable in eighty-eight days after it was issued, "not served for want of property," is sufficient to authorize the issuance of an execution by the clerk of the circuit court, and a sale of real estate. The statute relating to the issue and enforcement of execution upon transcript judgments from justices of the peace, in force at the time of the transaction here under consideration (Rev. Stats. 1865, sec. 14, p. 717, and sec. 3, p. 718), provides that executions issued by justices of the peace shall be dated on the day they are issued and be returnable in ninety days from date, and be directed to the constable of the township where the justice resides, and run against the goods and chattels of the defendant. The party in whose favor the judgment is rendered may file a transcript in the office of the clerk of the circuit court, and it becomes a lien on the real estate of the defendant from the time of filing the transcript, just the same as a judgment of the circuit court. But the statute expressly prohibits the issuance of an execution out of the circuit court on the transcript judgment if the defendant is a resident of the county, "until an execution shall have been issued by the justice directed to the constable of the township in which defendant resides, and returned that the defendant had no goods or chattels whereof to levy the same."

The evidence shows that the plaintiff was a resident of ⁵³¹Clinton county at the time the judgment of the justice of the peace was rendered against him, and the issuance of the execution by the circuit clerk on the transcript judgment, and continued so until the commencement of this suit. The authority, therefore, for the execution from the circuit clerk on the transcript judgment depended wholly on whether an execution had been issued by the justice and returned nulla bona by the constable at the expiration of ninety days. The evidence in this case is that these prerequisites were not complied with. The recitals in the justice's transcript, read in evidence by plaintiff, show the rendition of judgment by the justice of the peace, February 13, 1873, the issuance by the justice of an execution thereon, returnable on the twelfth day of May, 1873, and the constable's return on that date "not served for want of property." Excluding, then, the date of issue, and including the return day,

it will be seen that the execution issued by the justice was made returnable in eighty-eight, instead of ninety, days, as provided by the statute in force when the same was issued. The execution of the justice was not only returnable, but was returned in less time than the statute required. It is clear, therefore, that the judgment creditor was not entitled to an execution out of the circuit court on the transcript judgment, and that this execution was prematurely issued, and will not support the sheriff's sale and deed thereunder: *Dillon v. Rash*, 27 Mo. 243; *Johnson v. Latta*, 84 Mo. 139; *Marks v. Hardy*, 86 Mo. 232; *Huhn v. Lang*, 122 Mo. 600, 27 S. W. 345; *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606, 47 S. W. 927.

The statutes not having been complied with, the defendant acquired no title by the sheriff's deed. It has frequently been held by this court, since the early case of *Dillon v. Rash*, 27 Mo. 243, that when the time is fixed by law for the return of an execution, it should not be returned before that time, and that its return at a prior date is not only premature and irregular, but ⁵⁸² is insufficient to support further proceedings resting thereon. To give sanction to the views of appellant and hold that the execution of the circuit clerk, issued in the face of the defective return, appearing in the transcript of the proceedings of the justice before him, is an irregularity only, that must be taken advantage of by a motion to quash the writ, is to destroy by construction, not only the letter, but the substance and life, of the statute.

Moreover, it will be observed that the transcript of the justice, in the case of *Lyons et al. v. Reed*, shows "execution returned not served for want of property." This does not meet the requirements of the statute, and is not sufficient to authorize the issuance of an execution by the clerk of the circuit court, under the provisions of the statute above referred to. The return required by the statute is "that the defendant had no goods or chattels whereof to levy the same." This contemplates that the officer has and shall make some effort to find property liable to seizure under the execution. The return here fails to indicate any effort whatever to find property, nor does it negative the idea that the defendant in execution had property, subject to the writ. "Not served for want of property" does not meet the requirements of a thorough search and failure to find any property belonging to the defendant in the execution. Nor is it synonymous with *nulla bona*, which has a well-defined mean-

ing in law, signifying that the defendant in the execution has no goods which could be subject to its satisfaction.

In the early case of *Burke v. Flourney*, 4 Mo. 116, discussing the question of filing transcripts of a justice's judgment and issuing executions thereof, the court said: "The act of the general assembly authorizes this to be done, but it requires that before an execution can issue on a judgment thus filed in the clerk's office an execution shall have issued from ⁵³³ the justice, and returned no goods to be found. In this case the only evidence of the facts were found in the justice's docket or transcript, which says an execution had issued, and that the constable returned not satisfied by levying on the property of Burke and making some twenty-nine dollars—the return does not show that the defendant, Burke, had no more goods, etc. The law is express that no execution shall issue from the clerk until a return nulla bona is made to an execution issued by the justice."

Herman on Executions, page 387, thus states the rule: "An officer has no right to make return (nulla bona) without having made an effort to find any of the property of the defendant. A general report that the defendant has no goods will not excuse such a return. It may be made after one thorough search."

In *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606, 47 S. W. 927, a return, "Executed the within writ by reading to W. L. Few, and scheduled the property of defendant. Execution returned not satisfied," followed by the oath of three appraisers, and a copy of the schedule describing the property, was held insufficient to authorize the issuance of an execution by the clerk of the circuit court, because it was not inconsistent with the possibility that the defendant in the execution had other property, which, perhaps, the officer had seized along with that scheduled.

In view of the express statutory prohibition against issuing an execution by the circuit clerk until an execution shall have been issued by the justice, and returned, that the defendant had no goods or chattels, whereof to levy the same, no presumption obtains that the constable did his duty, and after diligent search, failed to find any property belonging to the defendant in the execution. This precise question was considered and decided by this court in an opinion by Marshall, J., in *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606, 47 S. W. 927, wherein it was said: "There is a difference between indulging a presumption in favor of an officer ⁵³⁴ having done a duty which the

law casts upon him, and indulging a presumption that a fact exists which the statute requires to exist in order to give the officer power to act, and without which he is prohibited from acting." "A person," said Judge Marshall, in that connection, "who buys real estate that is sold under this statute gets no title unless that statute is strictly followed, for, while it gives a remedy to the creditor, it also protects the debtor."

Such a return will not support the execution issued by the circuit clerk, and subsequent proceedings thereunder. It devolves upon the constable, when he fails to obtain any property in satisfaction of the execution, to make a return in which it is definitely stated, or from which it can be implied, that the defendant in the execution has no property subject to the writ. Where, as in this case, the judgment debtor is a resident of the county, it devolves on the party claiming under the sheriff's deed to show that an execution had been issued by the justice of the peace and returned nulla bona, at the expiration of ninety days before an execution could be issued by the clerk of the circuit court. These jurisdictional facts cannot be presumed, especially against the positive prohibition of the statute.

In the present case it appears from the transcript of the justice, which was the only evidence offered on that point, not only that the execution issued by the justice was returnable before the expiration of ninety days, but the constable's return, as we have seen, was not in conformity with the statute. This defect is not supplied by the sheriff's deed, for it merely recites the rendition of the justice's judgment, the filing of the transcript in the circuit clerk's office, and the issuance by the clerk of an execution on such transcript judgment. There is no recital that an execution had been issued by the justice, and returned nulla bona before the execution issued by the circuit clerk.

⁵³⁵ It is, however, insisted by counsel for defendant that this proof is supplied by the averments in the petition setting out the execution issued by the circuit clerk, wherein that official recites that an execution had been issued by the justice and returned "not satisfied, no goods and chattels being found whereon to levy the same." It is true that the petition sets out the execution issued by the circuit clerk, but it is expressly averred that the recitals touching the issuance of execution by the justice of the peace and the return nulla bona by the constable are false. Hence, it cannot be said that this defect is cured by the pleadings. Besides, a recital in an execution, is-

sued by the circuit clerk on a transcript of a judgment of a justice of the peace, that an execution had been issued by the justice, and returned that the defendant had no goods or chattels whereof to levy the same, is not evidence of these facts. The clerk is without authority to certify to such facts: *Coonce v. Munday*, 8 Mo. 374.

It is also urged that this proceeding ought to have been dismissed, because of the pendency of the partition suit, in which the issues here could have been determined. There is no merit whatever in this contention. It is not perceived how the pendency of such suit in anywise precluded plaintiff from maintaining the present action.

The final contention is, that the statute of limitations is a complete bar to this action.

The intermediate estate was determined on February 9, 1898, by the death of Mary Reed, and the plaintiff being in possession, brought this suit in April following, to remove the cloud on his title. The rule is well settled that the statute of limitations does not begin to run against a reversioner until the death of the life tenant. It never became necessary for plaintiff to take affirmative action until the death of the life tenant in February, 1898. The statute of limitations, therefore, ⁵³⁶ cannot be invoked as a bar to the equitable relief sought in this action.

This view of the case renders unnecessary an examination of the other points discussed in the briefs.

The judgment of the circuit court will therefore be affirmed.

All concur.

Execution—Sufficiency of Return.—The statement in the return of an execution nulla bona that the writ is returned not satisfied is not equivalent to a statement that the defendant has no goods or chattels whereof to levy the same: *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606, 47 S. W. 927. But it has been held that a return by a sheriff, "I know of no property subject to the writ fieri facias," is equivalent to the return nulla bona: *Gunn v. Howell*, 85 Ala. 144, 73 Am. Dec. 484; *Gibson v. Robinson*, 90 Ga. 756, 35 Am. St. Rep. 250, 16 S. E. 969.

Execution—Necessity of Return.—An execution issuing out of a court when a transcript is filed, without a pre-existing return of nulla bona, is void, if the statute provides that no execution shall be issued on such transcript until an execution issued out of the court wherein the judgment was rendered has been returned that the defendant has no goods or chattels whereof to levy the same: *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606, 47 S. W. 927.

Public Officers are Presumed to have performed their duties: *Hogue v. Corbit*, 156 Ill. 540, 47 Am. St. Rep. 232, 41 N. E. 219; *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646, and cross-reference note thereto, 22 S. W. 899. But such presumption does

not go to the extent of supplying a jurisdictional fact: *Hannah v. Chase*, 4 N. Dak. 351, 50 Am. St. Rep. 656, 61 N. W. 18. And there is a difference between indulging a presumption in favor of an officer having done a duty which the law casts upon him, and indulging a presumption that a fact exists which the statute requires to exist in order to give the officer power to act: *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606, 47 S. W. 927.

The Statute of Limitations does not run against a remainderman until the termination of the life estate: *Sutton v. Clark*, 59 S. C. 440, 82 Am. St. Rep. 848, 38 S. E. 150; *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387, 77 N. W. 942.

BERKLEY v. TOOTLE

[168 Mo. 584, 68 S. W. 681.]

JUDGMENTS—ACTIONS ON.—BY THE LAWS OF KANSAS, a personal judgment against two parties is a joint and several obligation, and an action upon it can be maintained against either of the judgment debtors separately. (p. 589.)

JUDGMENTS—ACTIONS ON—STATUTE OF LIMITATIONS.—Prior to revision of the Missouri laws of 1899, an action upon a judgment of a court of record of a sister state was not barred until after the lapse of twenty years from its date. (p. 589.)

JUDGMENTS—ACTIONS ON—WHEN BECOME DORMANT.—IN KANSAS, when a judgment becomes dormant by a failure to issue execution thereon for five years, and has not been revived, and no suit has been brought thereon within one year after the expiration of the five years, no suit can thereafter be maintained upon it. (p. 592.)

STATUTE OF LIMITATIONS—EXTINGUISHMENT OF RIGHT OF ACTION—SUIT IN ANOTHER STATE.—Where the statute of limitations of the place where a contract is made operates to extinguish the contract or debt itself, no action can thereafter be maintained upon such contract in the courts of another state; the *lex loci contractus*, and not the *lex fori*, governs. (p. 592.)

FOREIGN JUDGMENTS—ACTIONS ON—STATUTE OF LIMITATIONS—LEX FORI.—Where all remedy on a judgment has not been destroyed by the statute of limitations of the state where it is rendered, and the judgment is not dead, an action may be maintained thereon in the courts of another state, and the statute of limitations of the latter state applies. (pp. 592, 593.)

B. P. Waggener, Albert H. Horton, and Edward D. Osborn,
for the appellants.

Richard S. Horton, George W. Groves, and W. K. James,
for the respondents.

580 BRACE, P. J. This is an appeal from a judgment of the Buchanan circuit court, in favor of the respondent, against the appellants, Kate M. Tootle, William W. Wheeler, Joshua Motter, and Frances M. Dameron, for the sum of three thousand three hundred and two dollars and eighty-five cents, in an action on a judgment of the Decatur county district court in the state of Kansas.

There was no dispute about the facts, which are as follows: On the eighth day of March, 1892, the plaintiff obtained judgment in the district court of Decatur county, Kansas (a court of general jurisdiction, having jurisdiction of the parties ⁵⁸⁰ and of the subject matter), against Kate M. Tootle, William E. Hosea, William W. Wheeler, Joshua Motter, and Frances M. Dameron, partners, doing business under the firm name of Tootle, Hosea & Company; Hiram Patterson, Henry Thomas and Charles Zook, partners, doing business under the firm name of Patterson, Thomas & Company; Moses D. Wells, Henry J. McFarland, and R. B. Wells, partners, doing business in the firm name of M. D. Wells & Company; E. P. Reed and S. V. Pryor & Son, a copartnership, for the sum of two thousand and fifty-two dollars and eighty-five cents. Thereafter, the said defendants prosecuted a petition in error to the supreme court of the state of Kansas, by which court said judgment was affirmed on the sixth day of June, 1896, and its mandate filed in said district court on the 27th of June, 1896.

Pending these proceedings, on the 17th of April, 1893, the said Hosea died, at his domicile, in Buchanan county, Missouri, and in that month letters of administration of his estate were duly granted by the probate court of said county and during all the time of the pendency of these proceedings in the district court of Decatur county, and in the supreme court of Kansas, the appellants were residents of the state of Missouri, as they now are, and ever since have been, and have not been within the state of Kansas since the rendition of the judgment by the said Decatur county district court.

On the third day of December, 1897, on motion of the respondent, notice of which was given by publication, but of which appellants had no actual knowledge, an order was made by the judges of said district court, reviving said judgment against the administrators of the said William E. Hosea, deceased, and against the other of said judgment defendants and each of them.

Afterward, on the 15th of January, 1898, this suit was instituted by the respondent in the circuit court of Buchanan ⁵⁸¹

county, Missouri, against all of said defendants, except Hosea, deceased; but, the appellants being the only ones served, it was dismissed as to the others.

The appellants answered, denying the allegations of the petition, pleading the statute of limitations, and certain statutes of the state of Kansas, setting up thereon the defense, upon which they rely, that at the time this suit was brought the said judgment, under the laws of Kansas, was dead, and no action could be maintained thereon.

Afterward, on the twenty-fourth day of February, 1898, the appellants, with the said Moses Wells, Henry J. McFarland, and R. P. Wells, partners as aforesaid, appearing specially for that purpose, filed their motion in the district court of Decatur county, Kansas, to set aside the order of the judge of said court, of the 3d of December, 1897, reviving said judgment, which motion was, on the ninth day of March, 1898, sustained as to the said Hosea, deceased, and his administrators, and overruled as to the other defendants.

Thereupon, appellants, with the said Wells, McFarland, and Wells, prosecuted a petition in error, with supersedeas, from the order of said district court overruling the motion to set aside the order reviving said judgment to the supreme court of Kansas, and on the third day of June, 1898, filed their motion in the circuit court of Buchanan county, Missouri, for a continuance of this suit until the petition in error of appellants and the said Wells, McFarland, and Wells, should be heard and determined by the supreme court of Kansas, which motion was overruled, and, on the same day, the case, coming on for trial, was tried, and the judgment rendered, from which this appeal was taken on the 14th of June, 1898. No execution was ever issued and no payment was ever made on the Kansas judgment, nor was it ever exhibited as a demand against the estate of Hosea in the probate court of Buchanan county.

592 On the 8th of April, 1899, the ruling of the district court of Decatur county, refusing to set aside the order of revival, aforesaid, was reversed by the supreme court of Kansas, on the ground that the judge who made the order of revival was of counsel for the judgment plaintiff, and had a pecuniary interest in the judgment to the extent of his fee, for which he had filed an attorney's lien: *Tootle v. Berkley*, 60 Kan. 446, 56 Pac. 755.

1. By the laws of Kansas a personal judgment against two parties is a joint and several obligation, and an action upon it

can be maintained against either of the judgment debtors separately: 2 Kan. Gen. Stats. 1897, c. 114, p. 590; Read v. Jeffries, 16 Kan. 534; Stout v. Baker, 32 Kan. 113, 4 Pac. 141. And, in considering this case, the judgment in question may be treated simply as a joint and several judgment against the appellants, and the other parties thereto may be disregarded. In that state an action at law may be maintained on a domestic judgment. The right of action accrues at the date of the rendition of the judgment, and, when no execution has been issued, is barred by the statute of limitations of that state by the lapse of five years from its date, unless the case falls within some of the exceptions of that statute, one of which is absence from the state: 2 Kan. Gen. Stats. 1897, cap. 95, secs. 12, 15; Burnes v. Simpson, 9 Kan. 658; Hummer v. Lamphear, 32 Kan. 439, 49 Am. Rep. 491, 4 Pac. 865; Schuyler Co. Bank v. Bradbury, 56 Kan. 355, 43 Pac. 254.

By the laws of this state in force at the time this suit was brought an action on the judgment of a court of record of a sister state was not barred until after the lapse of twenty years from its date: Rev. Stats. 1889, sec. 6796.

If we had only the statutes of limitations *eo nomine* of these states to deal with in this case, there would be no difficulty in sustaining the judgment of the circuit court, for it was well-settled law in this state, prior to the revision of 1899, when a new section (4280) was engrafted upon our statute of ~~593~~ limitations changing the rule, that in an action on a judgment of a sister state, the statutes of limitation of the state in which suit is brought is to be applied, and not the statute of the state in which the judgment is rendered. Even if the reverse were the rule, and the Kansas statute of limitations could be applied, the appellants having been nonresidents of that state, and continuously absent therefrom ever since the rendition of the Kansas judgment, the action could have been maintained. But the law upon which the appellants rely to defeat this action is not the literal statute of limitations of either state, but certain statutes of the state of Kansas, which, as construed by the supreme court of that state, affect the life of its judgments, and which are as follows:

“Sec. 455. If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment, and the time of suing out another

writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on the estate of the judgment debtor."

"Sec. 439. If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment."

"Sec. 425. The revivor shall be by an order of the court, if made in term, or by a judge thereof, if during vacation, that the action be revived in the name of the representatives or successor of the party who died, or whose powers ceased, and proceed in favor of or against them.

"Sec. 426. The order may be made on the motion of the adverse party, or of the representatives or successors of the party who died, or whose powers ceased, suggesting his death or ⁵⁹⁴ the cessation of his powers, which with the names and capacities of his representatives or successor shall be stated in the order.

"Sec. 427. If the order is made by the consent of the parties, the action shall forthwith stand revived; and if not made by consent, notice of the application for such an order shall be served in the same manner and returned within the same time as a summons, upon the party adverse to the one making the motion; and if sufficient cause be not shown against the revivor, the order shall be made.

"Sec. 428. When the plaintiff shall make an affidavit that the representatives of the defendant, or any of them in whose name it is desired to have the action revived, are nonresidents of the state, or have left the same to avoid the service of the notice, or so concealed themselves that the notice cannot be served upon them, or that the names and residences of the heirs or devisees of the person against whom the action may be ordered to be revived, or some of them, are unknown to the affiant, a notice may be published for three consecutive weeks, notifying them to appear on a day therein named, not less than ten days after the publication is complete, and show cause why the action should not be revived against them; and, if sufficient cause be not shown to the contrary, the order shall be made."

"Sec. 432. An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representative or successor, unless in one year from the time it could have been first made.

"Sec. 433. An order to revive an action in the names of the representatives or successor of a plaintiff may be made forth-

with, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his powers have ceased in the meantime, the order of revivor on both sides may be made in the period limited ⁵⁹⁵ in the last section": 2 Kan. Gen. Stats. 1897, cap. 95.

Under this statute, as construed by the supreme court of Kansas, where a judgment has been permitted to become dormant by the neglect of the creditor to issue execution thereon for five years, has not been revived in the manner provided by the statute, and no suit upon the judgment has been brought within one year after the expiration of the five years, no suit can thereafter be maintained upon it: *Chapman v. Chapman*, 48 Kan. 636, 29 Pac. 1071; *Mawhinney v. Doane*, 40 Kan. 676, 681, 17 Pac. 44, 20 Pac. 488; *Baker v. Hummer*, 31 Kan. 325, 2 Pac. 808; *Kothman v. Skaggs*, 29 Kan. 5; *Angell v. Martin*, 24 Kan. 334; *Gruble v. Wood*, 27 Kan. 535; *Burnes v. Simpson*, 9 Kan. 658; *State v. McArthur*, 5 Kan. 280.

In these circumstances, the judgment once dormant becomes a dead judgment, incapable of supporting an action in that state, or in this: *Dempsey v. Oswego*, 51 Fed. 97; *St. Louis Type Foundry Co. v. Jackson*, 128 Mo. 119, 30 S. W. 521. The last case cited was an action brought in this state on the twenty-fifth day of August, 1892, on a Kansas judgment rendered on the twelfth day of July, 1875, which had never been revived or kept alive by the issuance of execution thereon; and came before this court in division two, at the April term, 1895. Burgess, J., who delivered the opinion of the court, after setting out the aforesaid Kansas statute, and reviewing some of the leading Kansas cases construing the same, said: "By the statute all remedy was taken away, which is never done without an intention to destroy the right (*Moore v. Luce*, 29 Pa. St. 262, 72 Am. Dec. 630), and it would seem 'illogical to hold that the remedy may be destroyed and the legal right remain': *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 344, 1 S. W. 585. From a legal standpoint the existence of one implies the existence of the other, and it would seem impossible that one can exist without the other. In *McMerty v. Morrison*, 62 Mo. 140, it was said: ⁵⁹⁶ 'The doctrine is firmly rooted that the statute of limitations of the country in which suit is brought may be pleaded to bar a recovery on a contract made out of its political jurisdiction, and that the statute of the place where the contract was made cannot be so pleaded. But where the

statute of limitations where the contract is made operates to extinguish the contract or debt itself, the case no longer falls within the law in respect to the limitation of the remedy; and when such a contract is sued upon in another state, the *lex loci contractus*, and not the *lex fori*, is to govern.' The right being extinguished by the statute of limitations of Kansas, the case does not come within the law of limitations as to the remedy, and must be governed by the laws of that state, where the judgment was rendered: *Baker v. Stonebraker*, 36 Mo. 339; *McMerty v. Morrison*, 62 Mo. 140." And it was accordingly so held, all the judges of that division concurring.

In that case, at the time suit was brought in Missouri, on the Kansas judgment, the defendant had always been a resident of Kansas, and an action against him in that state was barred by its statute of limitations. No execution had ever been issued on the judgment, and after the lapse of five years from its date it had become dormant. Thereafter, within one year, it had not been revived as it might have been, and no suit had ever been brought on it; all remedy on it in that state had been destroyed, and the judgment was dead. But the case in hand is quite different—leaving out of view entirely the attempt at revival, which finally proved futile, but not for any lack of vitality in the judgment.

When the suit was brought in Missouri, on the Kansas judgment, in this case, the defendants being within the exceptions of the Kansas statute of limitations, an action against them in that state was not barred by that statute, and although the judgment had become dormant by the failure to have execution ⁵⁹⁷ issued for five years, yet the one year thereafter within which it could have either been revived or action brought on it in that state had not expired; either of these proceedings could have been maintained on it in that state; all remedy on it had not been destroyed by its laws, and the judgment was not dead, as in the Jackson case. Hence, the judgment in this case does not come within the principle of that case, or any of those upon which it is based, and is not taken out of the general rule by which our own statute of limitations is made applicable.

The judgment of the circuit court ought, therefore, to be affirmed, and it is so ordered.

All concur.

Dormant Judgment.—A levy under an execution on a judgment more than five years old, without an issue of *scire facias* thereon, is irregular merely and not void: *Sherrard v. Johnston*, 193 Pa. St. Am. St. Rep., Vol. LXXXV—38

166, 74 Am. St. Rep. 690, 44 Atl. 252. See, further, Eddy v. Coldwell, 23 Or. 163, 37 Am. St. Rep. 672, 31 Pac. 475; Rain v. Young, 61 Kan. 428, 75 Am. St. Rep. 325, 59 Pac. 1068; Davis v. Comer, 108 Ga. 117, 75 Am. St. Rep. 33, 33 S. E. 852.

Statutes of Limitations are Laws of Process, and if they do not extinguish the right itself, are deemed to operate on the remedy merely, and all questions arising under them must be determined by the law of the forum, and not by the law of the situs of the contract: Lamberton v. Grant, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; Wright v. Mordaunt, 77 Miss. 537, 78 Am. St. Rep. 536, 27 South. 640. In an action on a judgment obtained in another state, the plea of statute of limitations is a plea to the remedy, and the *lex fori* governs: Arrington v. Arrington, 127 N. C. 190, 80 Am. St. Rep. 701, 37 S. E. 212; Van Santvoord v. Roethler, 35 Or. 250, 76 Am. St. Rep. 472, 57 Pac. 628.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

ROBINSON v. BURKE.

[70 N. H. 2, 45 Atl. 713.]

EXEMPTIONS.—DAMAGES RECOVERABLE FOR CONVERSION OF EXEMPT PROPERTY may be reached by trustee process, in the hands of the judgment debtor. (p. 595.)

One Gleason recovered a judgment against a deputy sheriff for attaching goods exempt from attachment, and then, as a creditor of the plaintiff in attachment, and not as a party to the prior proceedings, sued him and summoned the defendant in attachment as trustee, moving for a stay of execution until his action against such plaintiff should be determined. Execution was stayed and exceptions taken.

W. W. Forbes, for the plaintiff.

Andrews & Andrews and D. W. Perkins, for the defendants.

YOUNG, J. All property which can be taken on execution can be attached on mesne process: Pub. Stats., c. 220, sec. 1. At common law, all the debtor's property, with a few trifling exceptions not material in this case, could be taken on execution, and it follows that all of his property which is not exempted by statute can be taken now. Damages recovered for the conversion of property exempt from attachment are not themselves exempted by statute (Pub. Stats., c. 138, sec. 1; Pub. Stats., c. 220, sec. 2; Pub. Stats., c. 245, sec. 20), and can be reached in the hands of the judgment debtor by trustee process, unless they so far partake of the nature of such property as to be ex-

empt for that reason. Generally, the proceeds of such property are not exempt from attachment: *Morse v. Towns*, 45 N. H. 185; *Manchester v. Burns*, 45 N. H. 482, 488; *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128; *Currier v. Sutherland*, 54 N. H. 475, 487, 20 Am. Rep. 143; *Hall v. Johnson*, 64 N. H. 481, 14 Atl. 24; *Brookfield v. Sawyer*, 68 N. H. 406, 39 Atl. 257. This case is no exception, for no good reason can be given why one rule should be applied to damages recovered for the conversion by third parties of property exempt from attachment, and another rule to damages recovered upon a policy of insurance covering such property: *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128. ³ The reason why the plaintiff in the original action against Robinson cannot take the proceeds of this judgment to satisfy his debt is that no one will be allowed to profit by his own wrong, and do by indirection that which he could not do in a direct proceeding, and not because the judgment so far partakes of the nature of the property as to be itself exempt from attachment.

Exception overruled.

Peaslee, J., did not sit; the others concurred.

Exemptions.—A judgment obtained for the conversion of exempt property is also exempt: *Cleveland v. McCanna*, 7 N. Dak. 455, 66 Am. St. Rep. 670, 75 N. W. 908. See the discussion of this question in the monographic note to *Cullen v. Harris*, 66 Am. St. Rep. 383-385.

SMITH v. BOSTON AND MAINE RAILROAD.

[70 N. H. 58, 47 Atl. 290.]

NEGLIGENCE, CONTRIBUTORY—CUSTOM OF PERSON INJURED.—Evidence that it was the uniform habit of a person to slacken the speed of his horse and look and listen for the approach of a train before attempting to pass over a certain railway crossing is competent as tending to show that he did so on the trip when he was injured by a passing train, and is also competent to show the exercise of due care on that occasion. (p. 597.)

NEGLIGENCE — RELYING ON PERFORMANCE OF A DUTY.—A person about to drive over a railway crossing with which he is familiar is justified in assuming that the railway company will perform its statutory duty, and warn him of an approaching train by sounding a whistle. Whether he is at liberty to rely upon such warning altogether is a question of fact. (p. 597.)

NEGLIGENCE — RAILROADS — DUTY TO STOP, LOOK, AND LISTEN.—The fact that a person does not entirely stop, look, and listen for the approach of a train before attempting to drive over a crossing with which he is familiar is not conclusive of a want of due care. (p. 600.)

F. M. Beckford and Stone & Shannon, for the plaintiff.

F. S. Streeter and Jewett & Plummer, for the defendants.

⁸² CHASE, J. Cate's uniform habit of slackening the speed of his horse to a walk at the Waukegan crossing, and looking and listening for the approach of a train before attempting to pass the crossing, tended to show that he did so on his fatal trip. It was substantial evidence of the exercise of care on that occasion: *Davis v. Concord etc. R. R. Co.*, 68 N. H. 247, 248, 44 Atl. 388, and authorities cited.

But it is said that this evidence proves too much to be of benefit to the plaintiff; that if Cate did exercise care to that extent, he must have discovered the approach of the train, and consequently must have been guilty of negligence in attempting to pass over the crossing ahead of it; that this evidence in connection with the other evidence bearing on the question is so uniform and weighty that impartial and reasonable men could not arrive at different conclusions upon it, but must agree that Cate's death was caused by his own negligence. This makes it necessary to examine the evidence sufficiently to ascertain whether it possessed uniformity and weight to the degree alleged.

The elevated land between the highway and the railroad track, with the house and fence upon it, obstructed the view of the track from the highway more or less. The obstruction was greater at some points than others. The defendants' experiments showed that, with the conditions as they were on the evening when the experiments were made, the light from the locomotive and cars could be seen above the fence, or through cracks in it, the most, if not all, of the distance between the house and the crossing. This night was cloudy, but there was a moon, while on the night of the accident it was cloudy, misty, and dark. The persons observing the experiments knew that the train was on the track, and it ⁸³ is fair to presume were specially alert in their efforts to see the light. They were there to make observations with a view of testifying in the case, and their attention was fixed upon the matter. Whether a man of average prudence, about to pass over a grade crossing,

would take the same pains in attempting to discover the lights of an approaching train, and whether the lights would be discovered without such pains, were pure questions of fact. These differences in the conditions between the night of the experiment and the night of the accident affect the weight of the testimony. It was also necessary to determine whether the lights of the train were in the same places and of the same intensity as those of the colliding train. When Cate got opposite the end of the fence he could see down the railroad for some distance—the distance increasing as he approached the track. The engineer of the train, who was looking ahead, did not see Cate's team until he was within three or four rods of it, and then saw only the horse's head and forward parts. They came from behind the fence, "right out of the darkness." The curve in the road caused the headlight to send its rays to the westerly side of the track, until it came near the crossing. It would not be contrary to reason to conclude from this evidence, accompanied with a view, that Cate by his sense of sight did not discover, and by the exercise of ordinary care would not have discovered, the approach of the train in season to avoid the collision. If he saw the train at the moment when the engineer first saw his horse, it would not follow, as a matter of law, that he was in fault for not stopping, although his horse was gentle and not afraid of cars: *Folsom v. Concord etc. R. R. Co.*, 68 N. H. 454, 38 Atl. 209.

But Cate was not called upon to rely upon the sense of sight alone. It was the duty of the defendants to give two long and two short whistles when their locomotive was eighty rods distant from the crossing: Pub. Stats., c. 159, sec. 6. Cate was justified in relying upon a performance of this duty: *State v. Boston etc. R. R. Co.*, 58 N. H. 408, 410; *Nutter v. Boston etc. R. R. Co.*, 60 N. H. 483. Whether he was at liberty to rely upon it altogether is a question of fact, and not of law: *Mitchell v. Boston etc. R. R. Co.*, 68 N. H. 96, 116, 34 Atl. 674.

It must be regarded as a fact that the whistle was not sounded on this occasion. There was competent evidence before the jury tending to establish this fact. The weight of the evidence depended largely upon the situations of the witnesses relative to the crossing at the time the whistle should have been sounded, their intelligence, their habits of observation, their candor, and their appearance generally—matters of which the jury had advantages for judging which the court do not have. Even

if the defendants' evidence appeared to the court to be of much greater weight than the plaintiff's, ⁸⁴ it ought not to, and could not, affect the finding here, nor at the trial term unless the preponderance of weight is so great as to show that the jury "were influenced by passion, prejudice, partiality, or corruption, or unwittingly fell into a plain mistake": *Fuller v. Bailey*, 58 N. H. 71; *Doughty v. Little*, 61 N. H. 365, 369; *Drown v. Hamilton*, 68 N. H. 23, 27, 44 Atl. 79. The jury found that Cate's want of knowledge of the approach of the train was due to the defendants' fault. The fault referred to seems to have been the failure to give the whistle for the crossing. The finding in effect was that Cate relied upon the whistle to notify him of the approach of the train. It would not be unreasonable for a man familiar with the two crossings mentioned in the case, as Cate must have been, to conclude that the train would not pass the second crossing, after whistling at the first, until it had whistled again.

It has been argued that the cases of employes against employers in which judgments have been directed for the defendants are authorities supporting the defendants' motion in this case. *Allen v. Boston etc. R. R. Co.*, 69 N. H. 271, 39 Atl. 978, with other cases, was cited upon this point, and may be taken as a representative case so far as this argument is concerned. Allen, an experienced brakeman, mounted a moving box-car so near to an overhead bridge, the existence and character of which he knew, that it was his duty to ascertain whether he was outside the bridge guard, if he intended to rely upon it to notify him of his approach to the bridge. If he had looked, he would have learned there was no guard. Upon these facts, about which there was no conflict in the evidence, it was held that he assumed the risk attending the passage under the unguarded bridge. Under the peculiar circumstances of the case, the railroad's failure to perform its duty increased Allen's responsibility for his own safety. It certainly was not a notice to him that he might safely attempt to pass the bridge as if it were properly guarded and he were outside the telltale. In this case, if Cate listened before attempting to cross the track, as the evidence tends to show that he did, he heard no whistle, because none was sounded. The defendants' failure of duty in this respect, instead of throwing the responsibility for Cate's safety in passing over the crossing upon him, was notice to him from the defendants that the crossing was not to be occu-

pied by them. It was an instance in which acts, or rather the omission of acts, spoke louder than words. As has been already said, Cate might be justified in acting upon this notice. It might properly be found that men of average prudence would do so. In short, it conclusively appeared that Allen knew or ought to have known of the nature and imminence of the danger to which he was exposed, while it is doubtful, to say the least, whether Cate knew of the dangers that were before him, or was in fault for not knowing of them.

⁸⁵ The defendants' motion to direct a verdict in their favor was properly denied. This conclusion is strongly supported by *Evans v. Concord R. R. Corp.*, 66 N. H. 194, 21 Atl. 105, a case closely resembling this in many of the facts.

The jury were instructed that it was Cate's duty, before attempting to cross the track, "to take such precautions to learn of the approach of trains as men of ordinary prudence would take in like circumstances." The defendants admit that, "as an abstract proposition, this was unexceptionable." But they say the only precaution that can be taken in such cases is to look or listen for a train, or both; and, consequently, that the duty is to look or listen, and should be so stated as matter of law. It is doubtful, to say the least, whether this is the only precaution available for the purpose. Familiarity with the manner in which the railroad is operated and the times when trains pass over it might excuse a traveler, under some circumstances, from looking or listening for a train when about to pass over the crossing. Other circumstances might show an exercise of ordinary care when there was a failure to look or listen. The law does not adopt particular circumstances as standards for measuring the degree of care required to amount to ordinary care. The circumstances in negligence cases are too numerous and variable to allow of this course. The rule must be so general that it may be applied to the circumstances of any case. Accordingly, the standard adopted is the care exercised by persons of average prudence under the same circumstances. It may be—often is—difficult to determine what this care would be in a given case. So far as known, a person may never have been called upon to act under the same circumstances. The question oftentimes must be determined by an exercise of sound common sense, in the light of one's general knowledge acquired by observation and experience. A jury composed, as it is, of twelve impartial men drawn from different walks in life, is as capable

of correctly determining such a question as a court composed of a less number of men whose training, occupation, and experience have not been so favorable for fitting them to form a sound judgment on the question. It certainly must be as apparent to jurymen as to members of the court that a person of average prudence will, under most circumstances, look or listen for a train when about to pass over a grade crossing. There is no more likelihood that a jury will be swayed by prejudice or passion in cases of this kind than in many other cases. If the defendants' views were adopted, it would take this class of cases out from the operation of the general rule governing negligence cases. It would also conflict with the general spirit of the law of the state. There is no sufficient reason for making such an exception. The instruction given correctly stated the rule⁸⁶ of law applicable to the circumstances of the case, and the defendants' exception to it must be overruled.

The defendants' exception to the instruction as to the relevancy of the testimony concerning Cate's habit of checking the speed of his horse, and looking and listening for trains when about to go over the Waukegan crossing, must also be overruled: *State v. Manchester etc. R. R. Co.*, 52 N. H. 528, 549, 550. The jury were told that they were to consider this habit "only as having some tendency to show that he checked his horse, looked, and listened on the night of the accident, as usual." Such a consideration of it excludes its consideration as proof that Cate was a cautious and careful man. The defendants' request was given in substance, and they have no ground for complaint.

Parsons, J., did not sit; the others concurred.

Railroad Crossing.—A traveler must look and listen before going upon a railroad track: *Guhl v. Whitcomb*, 109 Wis. 69, 83 Am. St. Rep. 889, 85 N. W. 142; *Aiken v. Pennsylvania R. R. Co.*, 180 Pa. St. 880, 17 Am. St. Rep. 775, 18 Atl. 619; *Tennessee etc. R. R. Co. v. Hansford*, 125 Ala. 349, 82 Am. St. Rep. 241, 28 South. 45. However, the fact that a trespasser on a track is guilty of contributory negligence does not relieve the railroad company from liability for injury to him if its employes fail to use reasonable care for his safety: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692; *Purcell v. Chicago etc. Ry. Co.*, 109 Iowa, 629, 77 Am. St. Rep. 557, 80 N. W. 682. The fact that a man killed at a crossing was careful and sober, and had previously exercised due care there, tends to repel any inference of negligence on his part: *Missouri Pac. Ry. Co. v. Moffat*, 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837. The burden of showing that he knew of the approach of the train, where the statutory signals were not given, is on the railroad company: *Nohrden v. Northeastern R. R. Co.*, 59 S. O. 87, 82 Am. St. Rep. 826, 37 S. E. 228.

COX v. SEVERANCE.

[70 N. H. 86, 46 Atl. 739.]

NEGOTIABLE INSTRUMENTS — GARNISHMENT.—The purchaser before maturity of a negotiable note, made and payable in the state by parties residing therein, takes it subject to attachment when the payor has, before the transfer, been summoned as the trustee of the payee. (p. 602.)

E. A. and C. B. Hibbard, for the plaintiffs.

Jewett & Plummer and S. E. Blackstone, for the defendants.

⁸⁶ WALLACE, J. The statute makes a trustee in foreign attachment chargeable “for a negotiable promissory note, or other ⁸⁷ instrument on which he is liable, made and payable in this state, or the parties to which, at the time of making the same, resided in this state”: Pub. Stats., c. 245, secs. 21-23. Before the passage of the act of 1841 (Laws 1841, c. 601), in relation to the trustee process, negotiable paper was not subject to that process in this state: *Stone v. Dean*, 5 N. H. 502; *Kibling v. Burley*, 20 N. H. 359; *Chadbourn v. Gilman*, 63 N. H. 353. This act made negotiable promissory notes “made or payable in this state, or the parties to which, at the time of making the same, resided in this state,” liable to that process: Laws 1841, c. 601, sec. 4. This statute remained substantially the same until 1867, when it was changed to its present form (Gen. Stats., c. 230, sec. 21), thereby extending it so as to embrace not only negotiable promissory notes, but also other instruments on which the trustee was liable, making it broad enough to include all negotiable paper. It was also changed at this time so as to require the note or other instrument subjected to the trustee process to be both “made and payable in this state,” and not either “made or payable in this state,” as under the original act and the statute before 1867: *Chadbourn v. Gilman*, 63 N. H. 353.

The test of the liability of the trustee imposed by the statute is that the service of the writ must have been made upon him before the note or other instrument was transferred in good faith and for a valuable consideration by the payee to a third person: Pub. Stats., c. 245, secs. 22, 23. The statute, in express terms, subjects negotiable notes to the trustee process under certain circumstances. The purchaser before maturity of

a negotiable note, such as is described in the statute, takes it subject to attachment when the payor has before the transfer been summoned as the trustee of the payee. To that extent the negotiability of the note is impaired. This effect has been given to the statute by repeated decisions of our court: *Peck v. Maynard*, 20 N. H. 183; *Kibling v. Burley*, 20 N. H. 359; *Amoskeag Mfg. Co. v. Gibbs*, 28 N. H. 316; *Philbrick v. Philbrick*, 39 N. H. 468; *Smith v. Foster*, 41 N. H. 215; *Orcutt v. Hough*, 54 N. H. 472; *Chadbourn v. Gilman*, 63 N. H. 353.

Here the notes for which the trustee is sought to be charged were made and payable in this state, and the parties at the time of making them also resided here, thus bringing them within the operation of the statute. As the writ was served upon the trustee before the notes were transferred to the claimants, the trustee is chargeable.

All concur.

Negotiable Paper is Generally Held not Subject to attachment and garnishment before maturity: *Willis v. Heath*, 75 Tex. 124, 16 Am. St. Rep. 676, 12 S. W. 971; *Davis v. Pawlette*, 3 Wis. 300, 62 Am. Dec. 690; *Hubbard v. Williams*, 1 Minn. 54, 55 Am. Dec. 66, and note. Compare *Skinner v. Moore*, 2 Dev. & B. 138, 30 Am. Dec. 155; *Sheets v. Culver*, 14 La. 449, 33 Am. Dec. 593; *Scott v. Hill*, 3 Mo. 88, 22 Am. Dec. 462. In *Serviss v. Washtenaw Circuit Judge*, 116 Mich. 101, 72 Am. St. Rep. 507, 74 N. W. 310, it is held that a negotiable note is subject to garnishment after its maturity.

GRAY v. FIFE.

[70 N. H. 89, 47 Atl. 541.]

EXEMPTIONS—WAGES.—Wages for labor performed by defendant after service upon the trustee are not exempt from attachment if they are inseparable from the other indebtedness of the trustee which is not exempt. (p. 603.)

W. B. Fellows, for the plaintiff.

Lach & Stevens, for the defendant.

89 PIKE, J. "The money, rights, and credits of the defendant shall be exempt from trustee process in the following instances, and the trustee shall not be chargeable therefor: 1.

Wages for labor performed by the defendant after the service of the writ upon the trustee": Pub. Stata., c. 245, sec. 20. The trustee's indebtedness to the defendant included not only wages for labor performed by the defendant, but also compensation for the services and use of his team; ⁹⁰ and "no means are furnished by which it is possible to extricate the privileged labor from the other ingredients composing the cause of indebtedness, and to ascertain its value." In such a case the trustee is chargeable: *Robbins v. Rice*, 18 N. H. 507.

Exception overruled.

The Exemption of Wages from Execution and attachment is discussed in the extended note to *Brown v. Hebard*, 91 Am. Dec. 411-425. As to who are laborers within the meaning of exemption statutes, see the extended note to *Oliver v. Macon Hardware Co.*, 58 Am. St. Rep. 308-309. Such statutes are given a liberal construction: *Rustad v. Bishop*, 80 Minn. 497, 81 Am. St. Rep. 282, 83 N. W. 449.

RHOBIDAS v. CONCORD.

[70 N. H. 90, 47 Atl. 82.]

MUNICIPAL CORPORATIONS—PERFORMANCE OF PUBLIC DUTY—LIABILITY.—The mere fact that a town is engaged in the performance of a public duty, through its agents, does not free it from liability for its negligent acts. (p. 605.)

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF AGENTS.—Municipal corporations are liable for injury to private rights or persons, resulting from negligence in the performance of a public duty, by their agents or servants, under their direction and control. (p. 610.)

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURY TO SERVANT.—A municipal corporation is liable for an injury to its servant employed on a public work, if such injury is caused by the negligence of its agent under its supervision and control, in failing to furnish such servant with a reasonably safe place in which to work. (p. 615.)

MUNICIPAL CORPORATIONS—AGENTS OF, WHO ARE—WATER COMMISSIONERS elected by a city council under an ordinance authorized by statute, are agents of the city, and not independent officers whose acts are beyond its direction and control. (p. 616.)

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF AGENTS.—Water commissioners elected by a city council are the

officers of the whole city, and not of any particular precinct, and, so far as they are answerable for their conduct, are answerable to the city and not to the precinct. (p. 616.)

Action to recover from the defendant city for personal injury received by plaintiff through the negligence of the agents of such city in placing him in an unsafe place to work while he was employed as a servant of the city in its waterworks department.

W. S. Peaslee and E. A. & C. B. Heibbard, for the plaintiff.

Sargent & Niles, for the defendants.

¹⁰⁶ PEASLEE, J. The plaintiff's demurrer raises the question whether there is in this state any common-law liability of a municipal corporation; and if there is, whether it exists in the class to which the present case belongs.

While it is the law of this jurisdiction that towns are, to a certain extent, a part of the state, and, therefore, not suable at common law, no case has gone so far as to hold that this rule applies ¹⁰⁷ to all cases. There are some expressions in *Wooster v. Plymouth*, 62 N. H. 193, which might, taken alone, bear such interpretation; but that this is not their meaning is apparent from the fact that the opinion is expressly limited in its application to the corporate rights of towns, "so far as they are involved in this suit," and relates to "their purely public capacity": *Wooster v. Plymouth*, 62 N. H. 221. The expressions are superfluous if towns have not rights and duties which are not purely public. It is important to note that the question there involved was "whether, in the vindication of rights purely public, the state is constitutionally entitled to trial by jury, and if it is not, whether, in this case, the defendants stand in the position of the state, or in the position of a private person": *Wooster v. Plymouth*, 62 N. H. 194. The court did not understand that the earlier cases upon common-law municipal liability were involved in the consideration of this question; for if there had been such understanding, it cannot be doubted that those cases would have received full consideration. Again, at the same term, it was said in another case: "To charge a corporation with damages for injuries arising from misfeasance and neglect of duty, no statute fixing the liability, there must be acts positively injurious committed by authorized agents or officers in the course of the performance of corporate powers, or in the execution of corporate duties, in distinction from those done in a public

capacity as a governing agency. . . . Municipal corporations may be liable for acts done under a grant of special powers not held under any general law, and from the execution of which some special profit or advantage is derived (*Rowe v. City of Portsmouth*, 56 N. H. 293, 22 Am. Rep. 464); and generally for injuries received from the negligent management of property not held for strictly public purposes, corporations are liable in the same way and to the same extent as individuals": *Edgerly v. Concord*, 62 N. H. 8, 19, 13 Am. St. Rep. 533. In another opinion, also delivered at the same term, this language was used: "The city was dealing with and managing the land as a private owner deals with and manages his own property. Under such circumstances the defendants would be liable for an injury resulting from their want of care, in the same manner and to the same extent that an individual would for his negligent acts in the care and management of his property": *Clark v. Manchester*, 62 N. H. 577, 579. It is evident that many of the remarks in *Wooster v. Plymouth*, 62 N. H. 193, which are correct as applied to the facts and questions of law involved in that case, are not applicable, and were not intended to refer, to cases involving dissimilar questions.

The mere fact that a town is engaged in the performance of a public duty is not enough to free it from all common-law liability for its acts, if the word "public" is to be taken in the broad sense of including every enterprise which may be supported by taxation. ¹⁰⁸ There is no case laying down such a doctrine in this state. *Farnum v. Concord*, 2 N. H. 392, merely states the rule as applicable to an action by a traveler for damages caused by a defective highway, giving no reasons therefor. The Massachusetts case relied upon (*Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63) was decided upon the authority of *Russell v. Men of Devon Co.*, 2 Term Rep. 667, and the reasons for the decision there have not been understood as going to the extent of denying all common-law liability of municipal corporations: See *Mower v. Leicester*, 9 Mass. 250, note; *Ball v. Winchester*, 32 N. H. 435, 442; *Eastman v. Meredith*, 36 N. H. 284, 298, 72 Am. Dec. 302; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Mayor of Lynn v. Turner*, Cowp. 87. In the case last cited the court of king's bench, speaking through Lord Mansfield, recognized the common-law liability of a municipality fourteen years before the decision of *Russell v. Men of Devon Co.* In *Ball v. Winchester*, 32 N. H. 435, 442, liability is denied upon the ground that high-

way surveyors are independent public officers, over whose acts the town has no control. So far as it decides that a town may, in the maintenance of highways, negligently flood the land of abutters, it is not now the law of this state: *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175. In *Eastman v. Meredith*, 36 N. H. 284, 288, 295, 301, 72 Am. Dec. 302, the decision is placed upon the ground that the action was based upon an injury to the plaintiff when in the exercise of a public right. If the injury had been caused by an infringement of a private right, the result might have been different. "If the defendants in the present case had laid and maintained the foundations of their town house across a stream, and caused the water to flow back on the plaintiff's land, according to these authorities they would have been liable": *Eastman v. Meredith*, 36 N. H. 296, 72 Am. Dec. 302. The general statements concerning liabilities of towns in *Proctor v. Andover*, 42 N. H. 362, are dicta. The decision is expressly put upon the ground that it was not the duty of the town to maintain the gate in question. *Hardy v. Keene*, 52 N. H. 370, only decides (so far as this case is concerned) that highway surveyors are not the agents of the town. "They are public officers, whose duties are prescribed by law. Their authority is not derived from the town, but from the statute. They are not under the control of the town. Their powers cannot be enlarged or abridged by any action of the town, and what they do or omit to do, in the proper exercise of their authority, is done or omitted because the law enjoins and describes their duties, independent entirely of municipal control or authority": *Hardy v. Keene*, 52 N. H. 377. *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533, applies the same rule to fire engineers. "They were public officers, amenable to law for their conduct, and not under control or direction of the city. They were not agents or servants of the city in any such sense as to bind it by their acts or make it liable ¹⁰⁰ for their defaults": *Edgerly v. Concord*, 62 N. H. 20, 13 Am. St. Rep. 533. In *Clark v. Manchester*, 62 N. H. 577, it is said that a town is not liable for neglect to perform "a public corporate duty"; but this falls far short of saying that it is not liable for negligence in the performance of a public work, whereby private rights are infringed. In *Sargent v. Gifford*, 66 N. H. 543, 27 Atl. 306, the nonliability of a town for defective highways at common law is upheld, because the duty to maintain them is imposed upon the town. "The duty is a public one, and it was placed upon towns without their procurement or assent. They derive no special benefit, pecuniary or

otherwise, from the performance of it. The service is not due from them to the state or to the public by force of a common-law obligation, but is imposed upon them by statute." Certain remarks in *Doolittle v. Walpole*, 67 N. H. 554, 38 Atl. 19, seem to be broad enough to warrant the assumption that a town is not suable in any case where the right of action is not expressly or impliedly conferred by statute; but these remarks were limited to "the purpose of the present inquiry." In *Gross v. Portsmouth*, 68 N. H. 266, 73 Am. St. Rep. 586, 33 Atl. 256, nonliability is put upon the same ground as in *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533. "The water commissioners are not the city's agents, but an independent board. The city cannot direct or control them in the discharge of their duties. They have exclusive authority to determine where and in what manner water-pipes shall be laid, and to do all other things touching the construction, maintenance, and management of the waterworks."

A careful consideration of these cases must lead to the conclusion that there is no general rule by which the common-law liability of towns has been ascertained. That there is such a liability in certain cases is well established in this state: See cases hereinafter cited. What cases will or will not come within this class may be determined, to some extent, by a process of elimination. It appears that towns are not liable at common law: 1. For the improper discharge of a purely governmental function: *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Doolittle v. Walpole*, 67 N. H. 554, 38 Atl. 19; 2. For neglect to perform duties imposed upon them without their consent: *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306; 3. For the acts of officers whose powers and duties are so fixed by the legislature that the town cannot control or direct their actions: *Ball v. Winchester*, 32 N. H. 435; *Hardy v. Keene*, 52 N. H. 370; *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533; *Gross v. Portsmouth*, 68 N. H. 266, 73 Am. St. Rep. 586, 33 Atl. 256. In every case in which it has been held that there was no liability, the decision has been placed upon one of these grounds. In no case has nonliability been put upon the broad ground that there is no common-law liability of a municipal corporation.

On the other hand, there are numerous cases wherein towns were held to answer for their acts without any statutory liability, ¹¹⁰ either expressly or impliedly imposed. Quantum meruit has been maintained to recover for building a highway when the plaintiff had failed to perform a special contract: *Wadleigh v.*

Sutton, 6 N. H. 15, 23 Am. Dec. 704; Davis v. Barrington, 30 N. H. 517. So where a town let a house for a term of years and the tenant made repairs, which were to be in lieu of rent, and was subsequently evicted before the end of the term, he was entitled to recover the value of the repairs to the town: Smith v. Newcastle, 48 N. H. 70. If a town so constructs a highway as to cause a nuisance upon the property of an abutter, the town is liable: Gilman v. Laconia, 55 N. H. 130, 20 Am. St. Rep. 175; Cole v. Gilford, 63 N. H. 60. The same rule applies to the construction of sewers (Vale Mills v. Nashua, 63 N. H. 136; Nutt v. Manchester, 58 N. H. 226), to a failure to properly care for highways after they are built (Parker v. Nashua, 59 N. H. 402), and to cases where the improper construction was not authorized, but has been paid for and the benefit accepted: Carpenter v. Nashua, 58 N. H. 37. Where the work of maintaining sewers is voluntarily undertaken, the town is liable for injuries to private property resulting from negligence in such work: Rowe v. Portsmouth, 56 N. H. 291, 22 Am. Rep. 464. The court has also sustained actions against towns for the obstruction of a private way (Willey v. Portsmouth, 64 N. H. 214, 9 Atl. 220), for money paid to discharge a debt due from the town (Sanborn v. Deerfield, 2 N. H. 251), for the expenditures of a committee to purchase land for a cemetery (Eastman v. Hampstead, 66 N. H. 195, 20 Atl. 975), for labor performed and materials furnished in the construction of waterworks (Leavitt v. Dover, 67 N. H. 94, 68 Am. St. Rep. 640, 32 Atl. 156), and for the expenses of a committee before the legislature: Rider v. Portsmouth, 67 N. H. 298, 38 Atl. 385; Bachelder v. Epping, 28 N. H. 354. If towns were mere divisions of the state, and could not be sued without authority from the legislature, many of these actions would have failed. The argument that the question of municipal nonliability was not raised in them is not well founded in fact. While the cases as reported do not, in most instances, mention this question, an examination of the reserved cases and the arguments of counsel will show that it was often before the court: See Carpenter v. Nashua, 58 N. H. 37, 104 Briefs and Cases, 649; Cole v. Gilford, 63 N. H. 60, 146 Briefs and Cases, 281; Vale Mills v. Nashua, 63 N. H. 136, 147 Briefs and Cases, 239.

So far as the questions involved in this branch of the law have been considered, the decisions seem to recognize three classes of cases in which towns are liable for torts at common law: 1. For negligent acts (even in the discharge of imposed duties) which

interfere with the rights of others, provided such rights do not depend upon the imposed duty: *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Carpenter v. Nashua*, 58 N. H. 37; *Parker v. Nashua*, 59 N. H. 402; ¹¹¹ *Willey v. Portsmouth*, 64 N. H. 214, 9 Atl. 220; 2. For their acts concerning property not employed in public use: *Clark v. Manchester*, 62 N. H. 577; 3. Where duties of a public nature are voluntarily assumed: *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464. The question of the soundness of the second and third classes is not involved in this case and is not considered. There is no substantial conflict between the decisions. The court has not said that a town was not engaged in a public (or governmental) service when repairing sewers (*Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464), and that it was so engaged when constructing waterworks: *Gross v. Portsmouth*, 68 N. H. 266, 73 Am. St. Rep. 586, 33 Atl. 256. The nature of the work was the same in both cases; but in the latter, the work was performed by persons over whose actions the city had no control, while in the former it was done by agents whom the city might direct as to time and methods of work. It is for this reason that there was a liability in one case and not in the other. Nor are these decisions based upon an ascertainment of what is or is not a public office. It was not the nature of the duties to be performed, but the fact that in doing them the actor was or was not subject to control by the town, that determined the question of liability. The decisions resulted from an application of the rule that one is not liable for the negligent acts of those whose conduct he has no right to direct or supervise: 2 *Dillon on Municipal Corporations*, sec. 974. "The maxim, *respondet superior*, depends on the presumed control implied by the relation between the parties": *Carter v. Berlin Mills*, 58 N. H. 52, 53, 42 Am. Rep. 572.

Nonliability has not been put upon the same ground in all cases; nor have the cases in which a liability was found to exist all depended upon a common rule. It is only in an attempt to put upon common ground cases which involve different principles that confusion arises. When the cases are properly classified they appear to be consistent with each other, and, in a general way, with the law of other states: See 2 *Dillon on Municipal Corporations*, secs. 962, 966, 971, 974, 981, 985. Viewed only with reference to the work in which the town was engaged, the decision in *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306, that the town was not liable at common law for injuries received by a

traveler, by reason of a defect in the highway, might seem to conflict with the holding that a town was so liable for building a highway so as to flow water over the abutter's land: *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175. But the reason for the different results is plain. To establish his case a plaintiff must show that he had a right which has been infringed. In *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306, the only right upon which the plaintiff could rely was the public one of using the highway, and the only duty of the town was the statutory one to maintain the way. The plaintiff's injury was suffered while he was in the exercise of a public right, and ¹¹² for this no action lies at common law: *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302. Take away the public right, and the plaintiff would stand only as a trespasser, to whom the town would owe no positive duty as to the condition of the premises: *Buch v. Amory Co.*, 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809. "The wrong thus complained of is not . . . in violation of the plaintiff's common-law right and the defendants' common-law duty, but a violation of the statutory highway right of a traveler, by a nonperformance of the defendants' statutory duty of keeping the highway 'in good repair, suitable for the travel thereon': *Doe, C. J., Edgerly v. Concord*, 59 N. H. 78, 79. As no private right had been infringed, the plaintiff had no cause of action at common law. In *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175, the situation was different. The right there invaded was the private right of property. The plaintiff complained, not that the town had failed to perform some public duty, but that it had invaded his property right. It was no answer to this complaint to say that the town was engaged in a public undertaking, or even that it was performing a public duty imposed upon it against its will. If such a defense were available, private rights would not be secure against arbitrary forfeiture, and the implied constitutional provision against taking private property for public use without compensation would be abrogated: *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 504, 511, 12 Am. Rep. 147. "We can solve more easily and safely questions of this character, if we take pains to free our minds from the false notion that a municipality had some indefinable element of sovereign power, which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person.' The same constitutional provision that protects the right of private property against invasion by private individuals 'must protect it from similar aggressions on the part of municipal

‘corporations’ ”: *Jeremiah Smith, J., Eaton v. Boston etc. R. R. Co.*, 51 N. H. 534, 12 Am. Rep. 147.

In many of the cases where a recovery has been had, the action was justified by being necessary to carry out the spirit of the supreme statute law. Although our constitution contains no express declaration that private property shall not be taken for public use without compensation, that rule is implied from the spirit of equality which pervades its every part. *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147, recognizes the doctrine that this rule authorizes suits against municipalities for damage to property occasioned in the execution of a public work. It is urged that this rule applies only to property that is taken directly for, and not merely in the course of the execution of, public works. For example: If it is useful for a municipality to lay a water-pipe across A's land, he is to be compensated; and if the act be done without process of law ¹¹³ or his consent, he may have redress. On the other hand, if in the building of the same waterworks the superintendent negligently floods B's garden, it is said that the corporation is not liable because the act does not inure to the benefit of the municipality. If this reasoning were sound, it would follow that the measure of A's damages would be the benefit of the municipality; and the fact that he is entitled to the value of the property taken shows conclusively that the right to recover rests upon a broader principle than that of an implied promise to pay for benefits received. In these matters, “the dictate of justice is that no person shall suffer unequally, and, if he does, that all should make compensation”: 2 Dillon on Municipal Corporations, sec. 1051c.

It is also said that the flooding of B's land is not the result of a public work, but of the negligence of the superintendent, and, therefore, the municipality is not liable. The answer to this is that the law so far takes notice of the fallibility and imperfection of all human endeavor that one who intrusts his affairs to his servant, under instructions, either express or implied, to do only that which is lawful, is responsible for the neglect of the servant so to do. The general rules of agency apply to towns. They are “subject to the same implications arising from their corporate acts, or the acts of their agents within the scope of their authority, without either vote, deed, or writing, as in the case of natural persons”: *Glidden v. Unity*, 33 N. H. 571, 577; *Holderness v. Baker*, 44 N. H. 414, 417; *Gray v. Rollinsford*, 58 N. H. 253; *Kinsley v. Norris*, 62 N. H. 652.

The claim is also advanced that it is unconstitutional to take the taxpayer's property to pay damages caused by the negligent acts of the superintendent—that the power to tax extends only to public purposes, and not to making reparation for injuries done by public agents. The argument proves too much. It denies the right to tax for any but strictly governmental purposes; while the law is that “in determining this question, the legislature cannot be held to any narrow or technical rule. Not only are certain expenditures absolutely essential to the continued existence of the government and the performance of its ordinary functions, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely upon considerations of honor, gratitude, or charity”: Cooley's Constitutional Limitations, *488. For many years towns in this state have been called upon to respond to suits to enforce a statutory liability for damages caused to individuals by a failure to keep highways in repair. Although there was no such liability at common law and although the nature and extent thereof under the statute has been treated of at great length, it has never before been suggested that the statute was an unconstitutional ¹¹⁴ infringement of the rights of taxpayers. If their property may be taken for a liability which was unknown to the common law, much more may it be for municipal obligations which the common law recognized.

The argument that, according to a perfect theory of the nature and end of all government, municipalities partake of the sovereign character of the state, and so cannot be liable to suit except when made so by statute, has not been overlooked. The argument would be entitled to weight if this was a new question, but that is not the present situation. It may be that a corporation, in part governmental and sovereign, and in part individual and accountable, does not satisfy the demands of pure reason or realize the ideal of those skilled in political science. The same thing may be said of many of the rules of the common law which have been adopted; yet those rules are of binding obligation: *Thompson v. Esty*, 69 N. H. 55, 45 Atl. 566. So as to the nature of municipal corporations, the theory of their dual character is too firmly imbedded in the common law to be removed, except by the law-making power. Whether it would be better if they were liable for every breach of duty, as suggested in *Ball v. Winchester*, 32 N. H. 435, 442, or whether, as the defendants here contend, they ought not to be liable at all, is a question to be settled by the legislative department of the government.

Ever since the time of the Roman empire, municipalities have been subject to private law relations, not applicable to sovereignty: 1 Dillon on Municipal Corporations, sec. 3. The exact location of the divisional line between those matters which are governmental and those which are not has not always been clearly indicated. Courts have not agreed upon the precise location of the line; but there has been no dissent from the proposition that municipalities have duties on each side thereof. This has been the law of the state for many years. It may fairly be assumed that many instances of legislative action or nonaction have been based upon it. Like the doctrine of the peculiar corporate character of proprietors of towns, the authority for it is to be found "in the records of New England, in the decisions of courts": *Proprietors of Cornish v. Kenrick, Smith* (N. H.), 270, 273. It is a part of the common law, and cannot be abolished except by the law-making power.

It may be, and probably is, true that the decided cases do not cover every phase of common-law municipal liability that may arise; but as they have sufficiently established the law for the purposes of the present case, it is not essential to pursue the general subject further. Nor is it necessary to inquire whether the grounds upon which nonliability has been placed are sound. The cases in which such a conclusion has been reached are of consequence ¹¹⁵ here only so far as an investigation of them is needed to show that they are not based upon a theory of general municipal immunity from suit. Taking the law as it has been declared in this state, a town is liable for the negligence of its agents which affects the private property rights of others. Is it any less liable when the right involved is personal instead of proprietary?

The basis of the cause of action is the infringement of a private right, a violation of those rules of conduct which from being custom became law, and which now govern the conduct of all in their relations to others, be those relations either personal or proprietary. A private right is infringed when a person's health is injured by emptying a sewer wrongfully in the vicinity of his residence, the same as when water is wrongfully turned upon his land. "On the question of liability, it might not be material whether the invasion were of bricks or of polluted atmosphere": *Towne v. Thompson*, 68 N. H. 317, 322, 44 Atl. 492. The case does not differ in principle from that of an employé who is entitled to be provided with a reasonably safe place in which to work, and to be associated with reasonably competent fellow-servants. The land owner's right of property and the laborer's right

of personal safety are alike given by the common law. They are both private rights, and the invader of the one is no more bound to answer for his acts than the infringer of the other. "The whole superstructure of the liability of municipal corporations for negligence and for trespasses upon property is built upon the same idea; since there can be no distinction on principle between the case where a municipal corporation—let us say in the prosecution of some public work, within its charter powers—unlawfully damages my property or injures my person, and where, acting for its own purposes, and within the scope of its charter powers, it takes my property": Seymour D. Thompson, in 33 *American Law Review*, 708.

The rule which governs this case is clearly stated by Perley, C. J., in *Eastman v. Meredith*, 36 N. H. 284, 295, 72 Am. Dec. 302, where it is said: "The plaintiff, in cases of this character, does not recover on the ground that he has been denied any public right which the corporation owed to him as a citizen of the town, or because he has suffered an injury, in the exercise of a public right, from the neglect of the town to perform a public duty. The corporation being authorized by law to execute the work, if, in their manner of doing it, they cause a private injury, they are answerable in the same way and on the same principle as an individual who injures another by the wrongful manner in which he performs an act lawful in itself. It has been sometimes made a question whether in the particular case the corporation were liable as principals for the conduct of those who performed the work on their account; ¹¹⁶ but where a work is once conceded to be done by the corporation, it would seem to be clear, on authority and general principles, that a corporation, public or private, must be held liable like an individual for injuries caused by negligence in the process of executing the work." For more than forty years this decision has been acted upon as correctly stating the law applicable to this class of cases. It states the law, not only of this jurisdiction, but of every jurisdiction where the common law prevails. "It is . . . universally considered, even in the absence of a statute giving the action, that [municipal corporations] are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties": 2 *Dillon on Municipal Corporations*, sec. 966. The case which announced the adoption here of this unquestioned rule of the common law cannot be held to have been overruled, to-

gether with the cases which have followed it, by remarks made in a case where the question was not involved and in which these cases are not mentioned. The case at bar falls within the rule laid down by these authorities. The complaint is of wrongful acts injurious to an individual. The term "private injury," as used in *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302, is synonymous with "private wrong," which is defined as "an infringement or privation of the private or civil rights belonging to individuals, considered as individuals," as distinguished from public wrongs, which "are a breach and violation of public rights and duties which affect the whole community, considered as a community": 3 Blackstone's Commentaries, 2. "Private wrongs, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; public wrongs, being a breach of general and public rights, affect the whole community": 1 Blackstone's Commentaries, 122. To determine what conditions or situations have the elements of private rights, as above defined, reference must be had to the positive law. The terms "private wrong" and "private right" cannot be defined further than to say that they include all those duties due from one person to another, for the breach of which the law gives an action: See 4 Blackstone's Commentaries, 5, note; *Ladd v. Granite State Brick Co.*, 68 N. H. 185, 37 Atl. 1041. Except as to those guaranteed by the constitution, private rights may be modified or enlarged by legislative action; but until this is done they remain as they were at the common law. So in this case, the contract of the parties created a situation which gave the plaintiff the common-law right to be furnished a reasonably safe place in which to work. The existence of the right cannot be doubted. It was a "particular right" concerning the individual only, and not one which "affected the whole community." It was in every sense such a right that a negligent violation of it ¹¹⁷ would be a civil injury or private wrong. It in no way depended upon the performance or nonperformance by the defendants of any public duty.

Were the water commissioners servants of the city, or were they "an independent board" whom the city could not "direct or control" "in the discharge of their duties"? The act authorizing the city to establish waterworks gives the full control thereof to the city, and provides that "the city may, either before or after the construction of the same, place them under the direction of a superintendent, or board of water commissioners, or of both, with such powers and duties as may, from time to

time, be prescribed by the city council of said city": Laws 1871, c. 69, sec. 5. Acting under this authority the city passed an ordinance, establishing a board of water commissioners, to whom it intrusted the entire management of its waterworks: Concord Rev. Ord. 1894, c. 22, secs. 2, 4. It is argued that this ordinance is, in effect, the same as a statute enacted by the legislature, and that therefore the commissioners come within the class of independent officers, whose acts the city cannot control or regulate, and for which it is not liable. The defect in this reasoning is apparent. The officer whose duties are fixed by the legislature is beyond the control of the city; and however much it may desire to change those duties, it is powerless to do so. On the other hand, the ordinance in this case, although enacted in the form of legislation, is a mere rule of conduct or delegation of authority given by the city itself to those employed in its service. It may change the duties or take away the powers granted at any time; and the ordinance in express terms reserves to the city councils the right to remove the commissioners: Concord Rev. Ord. 1894, c. 22, sec. 3. The commissioners were servants of the city: *Grimes v. Keene*, 52 N. H. 330, 335.

The defense that the suit should be against the precinct and not against the city is not available. "The water commissioners are the officers of the whole city, and not of the precinct, are elected by the city councils, and, so far as they are answerable for their conduct, are answerable to the city and not to the precinct": *Brown v. Concord*, 56 N. H. 375, 379.

Demurrer sustained.

Parsons and Young, JJ., concurred in the result only, holding that there is a statutory liability and dissenting from the decision that there is a liability at common law; the others concurred.

The Liability of Cities for the Acts of Their Agents and officers is considered in the monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376-413. A city, like an individual, is answerable for neglect or omissions resulting in injury: *Potter v. New Whatcom*, 20 Wash. 589, 72 Am. St. Rep. 135, 56 Pac. 394. As respects the performance of mere corporate duties, the rule of respondeat superior applies, and a city will become liable for the acts of its servants and agents which it has authorized or adopted: *Hollman v. Platteville*, 101 Wis. 94, 70 Am. St. Rep. 899, 76 N. W. 1119; *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853, 18 S. E. 447. See, also, *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 835, 45 Atl. 154. It is otherwise, however, when the acts of its officers pertain

to political or governmental affairs: *Esberg Cigar Co. v. Portland*, 84 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 691; *Prichard v. Board of Commrs.*, 126 N. C. 908, 78 Am. St. Rep. 679, 36 S. E. 353; *Bartlett v. Clarksburg*, 45 W. Va. 393, 72 Am. St. Rep. 817, 31 S. E. 819, and cross-reference note thereto, 72 Am. St. Rep. 821, 622. That a city is liable for the negligence of its water commissioners, see *Bailey v. Mayor*, 8 Hill, 531, 38 Am. Dec. 669; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. H. 1095; *Esberg Cigar Co. v. Portland*, 84 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 691; note to *Goddard v. Harpswell*, 30 Am. St. Rep. 400. Compare *Gross v. Portsmouth*, 68 N. H. 266, 73 Am. St. Rep. 586, 33 Atl. 256.

McGILL v. MAINE AND NEW HAMPSHIRE GRANITE COMPANY.

[70 N. H. 125, 46 Atl. 684.]

MASTER AND SERVANT—SAFE APPLIANCES.—THE DUTY OF A MASTER to exercise due care to furnish his servant with such appliances for his work as are suitable and may be used with safety extends only to such servants as are required or permitted, or, in the course of their employment, expected, to make use of the instrumentalities provided. (p. 618.)

MASTER AND SERVANT—VOLUNTEERS—ASSUMPTION OF RISK.—If a servant voluntarily, and without direction or acquiescence of his master, goes into hazardous work outside his contract of hiring and the line of his employment, he puts himself beyond the protection of the master's undertaking, and himself assumes the risk of any injury received while thus employed. (p. 619.)

MASTER AND SERVANT—VOLUNTEERS—ASSUMPTION OF RISKS.—A servant who, without request of his master and of his own motion voluntarily puts himself in a place of danger outside the line of his employment cannot recover for any injury while the master is in the exercise of ordinary care to avoid injuring him. (p. 621.)

J. H. Hobbs and F. B. Osgood, for the plaintiff.

J. B. Nash and W. D. H. Hill, for the defendants.

¹²⁶ PARSONS, J. The jury were instructed that the defendants were bound to exercise reasonable care to ascertain by proper ¹²⁷ inspection or examination that the cars were safe for the use which the defendants required their employes to make of them. To this instruction the defendants excepted, and requested an instruction that a shipper is not responsible for the construction of a car received from a railroad company in the ordinary course of business, unless there is a plain defect

that could be discovered by reasonable diligence. The question, if raised by the foregoing, whether the rule applicable to railroad companies, requiring inspection of the cars of other companies used for transporting freight, is or not applicable to persons upon whose sidings cars are delivered for loading or unloading, was decided adversely to the plaintiff in *McMullen v. Carnegie Bros. & Co.*, 158 Pa. St. 518, 37 Atl. 1043, while in *Spaulding v. W. N. Flint Granite Co.*, 159 Mass. 587, 34 N. E. 1134, a rule more favorable to the plaintiff than that included in the instructions given was approved. But in the view we take of the case we have not found it necessary to consider this question.

"As a matter of course, there can be no negligence where there is no duty": *Shearman and Redfield on Negligence*, sec. 15. It must appear, to render the defendants liable, that the action or omission to act, of which complaint is made, constituted a breach of a duty owed the plaintiff by the defendants. Conceding that a duty of inspection rested upon the defendants, such duty arises from the familiar principle that the master is bound to exercise due care to furnish the servant with such appliances for his work as are suitable and may be used with safety. Such duty is owed only to the servants required, or permitted, or, in the course of the business, expected, to make use of the instrumentalities provided. If the failure of inspection was a breach of duty to the employés at the stone-crusher, who were required to move the cars, such failure was no breach of any duty owed by the defendants to a stranger, or to McGill, who "had nothing to do with the work at the crusher." So far as appears, all the appliances furnished McGill for his work were safe and suitable. No harm came to him in his use of such as were furnished him. Neither did the defective brake or the running away of the cars render his place of work unsafe, or put him in danger in going to or returning from his work, or endanger his safety in the course of the employment for which he was hired. He was foreman of the granite shed and yard. Farther up on the siding running through the yard was the stone-crusher in charge of another foreman. When McGill observed the cars running away, he was in a place of safety. He was not responsible for the escape of the cars. He was not required by the direction of his employer or the nature of his employment to take any steps in the matter. His subsequent injury, arising from his unauthorized action, without request in fact or by implication ¹²⁸ from the defendants, and

not from any breach of duty owed him by the defendants, does not sustain a charge of negligence against them. Where the servant voluntarily and without directions from his master, and without his acquiescence, goes into hazardous work outside his contract of hiring, he puts himself beyond the protection of the master's undertaking; and, if he is injured, he must suffer the consequences: *Pittsburgh etc. Ry. Co. v. Adams*, 105 Ind. 151, 164, 5 N. E. 187; *Brown v. Byroads*, 47 Ind. 435; *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 23 N. E. 100; *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 141, 45 Am. St. Rep. 460, 57 N. W. 459, 22 L. R. A. 663, and notes.

In what McGill did in pursuit of the runaway cars he acted, not as the servant of the defendants in the course of his employment, but as a mere volunteer. One who, without request, of his own motion voluntarily puts himself into a place of danger cannot recover for any injury which may result from his own act: *Pike v. Grand Trunk Ry. Co.*, 39 Fed. 255; *Church v. Chicago etc. Ry. Co.*, 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861, and notes. Assuming that the dangerous situation—the cars beyond control upon the descending grade—was created by prior personal negligence of the defendants, the only question upon the view most favorable to the plaintiff is whether McGill, by the exercise of ordinary care, could have escaped injury to himself. If he could, the plaintiff cannot recover: *Nashua Iron etc. Co. v. Worcester etc. R. R. Co.*, 62 N. H. 159, 162. In such case the defendants are not liable, for the same reason that they could recover from McGill in case of injury to themselves or their property from his wrongful interference, because their antecedent negligence furnished merely the occasion, while McGill's want of care would be the responsible cause, of the injury, which would not have occurred except for his fault: *Davies v. Mann*, 10 Mees. & W. 546. Upon the question whether McGill, by the exercise of due care, could have escaped injury, the evidence presents nothing for submission to the jury. Reasonable men can come to but one conclusion upon the question: *Hardy v. Boston etc. R. R. Co.*, 68 N. H. 523, 41 Atl. 179. He was in a place of safety, threatened with no danger. He did not suddenly find himself "in a situation of danger, whatever action he might take": *Folsom v. Concord etc. R. R. Co.*, 68 N. H. 454, 460, 38 Atl. 209. He was under no obligation to act. His case is the same as that of any bystander or stranger who happened to observe the escaping cars. But the case does not stop here. To prevent cars that might start upon the descending

grade escaping to the main line, and to guard against the serious result likely to follow such occurrence, the defendants had provided a switch in the siding, which was usually kept open so that cars which might run away should be derailed before reaching the main line. The switch was open upon this occasion. McGill ran ahead of the first ¹²⁹ car and closed the switch, so that the car, instead of being derailed, followed on toward the main line. McGill then, without opening the switch or observing whether other cars were coming—a fact which the case shows he must have learned if he had looked—ran after the first car, and was run over by the second car which followed over the switch as left by him. He was injured, not only because he voluntarily went into danger from a place of safety to perform a work that was not his to do, but because, upon the occasion for which the defendants had devised a safeguard, he, by his own act, rendered such safeguard inoperative. Undoubtedly with the best of motives, for the purpose of preventing the slight loss which would result from dumping the car at the switch, and probably confident of his ability to catch and stop the car before it reached the main line, he voluntarily took the risk of the greater danger. By whatever cause the cars were originally set in motion, he wrongfully turned them from a comparatively safe course to one fraught with great danger, and assumed the responsibility for what might follow. That he was injured by the car following gives him no more claim against the defendants than if, having reached and been unsuccessful in stopping the first car, he had been injured in a collision with a train upon the main line.

After McGill placed himself upon the track in pursuit of the moving car, the defendants were still bound to exercise ordinary care to avoid injuring him. They could not without liability carelessly or negligently run upon or injure him: *Felch v. Concord R. R. Co.*, 66 N. H. 318, 29 Atl. 557; *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 541, 45 Am. St. Rep. 460, 57 N. W. 459. But there is no evidence that the defendants or their servants, by the exercise of any degree of care, could have prevented the injury, either by warning him of the second car or by opening the switch, which he had closed. It is clear from the case that they could not have prevented the injury after McGill had put himself in the place of danger. If there might be question whether for McGill's unauthorized act beyond the scope of his employment, without request and against the defendant's directions, the defendants might not be liable to third persons in-

jured thereby (*Andrews v. Green*, 62 N. H. 436; *Fredericks v. Northern Cent. R. R. Co.*, 157 Pa. St. 103, 27 Atl. 689), there can be no question that they are not liable to him or to his administratrix for an injury to him resulting from his own act. The question of remote and proximate cause is generally for the jury: *Boothby v. Grand Trunk Ry. Co.*, 66 N. H. 342, 34 Atl. 157; *Stark v. Lancaster*, 57 N. H. 88; *Gilman v. Noyes*, 57 N. H. 627. This proposition, however, is necessarily subject to the limitation affecting the submission of all questions of fact to the jury: that if on the evidence reasonable men can come to only one conclusion, there is no question for their decision: *Pike v. Grand Trunk Ry. Co.*, 39 Fed. 255; ¹³⁰ *Deschenes v. Concord etc. R. R. Co.*, 69 N. H. 285, 46 Atl. 467. Whatever the cause of the escape of the cars, McGill's act was a wrongful, responsible, intervening force, which was the proximate cause of his own injury: *State v. Manchester etc. R. R. Co.*, 52 N. H. 528, 552; *Gilman v. Noyes*, 57 N. H. 627; *Cooley on Torts*, 68-70. Upon the evidence no other conclusion is reasonable. The submission of the case to the jury was error. The verdict for the plaintiff must be set aside and a verdict entered for the defendants.

Exception sustained; judgment for the defendants.

Wallace, J., did not sit; the others concurred.

In *Parent v. Nausua Mfg. Co.*, 70 N. H. 199, 47 Atl. 261, it appeared that plaintiff was employed by the defendant as a weaver, and had nothing to do with the belts or machinery which were under the care of another employé. The latter, while adjusting a belt, beckoned to plaintiff to come to his assistance, and while so assisting plaintiff, was caught by the belt and injured. Recovery against the master was denied the servant under such circumstances, upon the principle that a servant voluntarily engaging in work outside the scope of his employment, and for which he was not hired, without request from the master, assumes the risk attendant thereon, and cannot recover for any injury received while so engaged. The principal case was cited as authority.

LIABILITY OF MASTER TO SERVANT WHO VOLUNTEERS UPON A DUTY WITH WHICH HE IS NOT CHARGED.

- I. General Rule—Nonliability of Master.
- II. Application of Rule.
- III. Direction of Fellow-servant.

I. General Rule—Nonliability of Master.—As a proposition of law, it is perfectly well settled that if a servant performs voluntarily, of his own motion, any sort of work, whether dangerous or

not, which is out of the line of his employment, without the direction, order, or consent of his master, and is injured thereby, the master is not liable. In such case the servant assumes the risk, and must take the consequences of his own act. In other words, if the servant voluntarily, and without direction from the master or a superior servant, goes into any kind of work, or performs any duty for the master outside of his contract of hiring, he puts himself beyond the master's implied undertaking of protection: *Chielinsky v. Hoopes etc. Co.*, 1 Marv. (Del.) 273-284, 40 Atl. 1127; *Ray v. Diamond State etc. Co.*, 2 Penne. (Del.) 526, 47 Atl. 1017; *Central R. R. etc. Co. v. Chapman*, 96 Ga. 769, 22 S. E. 273; *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810; *Cleveland etc. Ry. Co. v. Carr*, 95 Ill. App. 576; *Daly v. Haller Mfg. Co.*, 48 La. Ann. 214, 19 South. 116; *Pfeffer v. Stenn*, 26 N. Y. App. Div. 535, 50 N. Y. Supp. 516; *Cahill v. Hilton*, 106 N. Y. 512, 522, 13 N. E. 339; *Linstrand v. Delta Lumber Co.*, 65 Mich. 254, 32 N. W. 427; *Wagen v. Minneapolis etc. R. R. Co.*, 80 Minn. 92, 82 N. W. 1107; *Texas etc. R. R. Co. v. Taylor* (Tex. Civ. App.), 44 S. W. 892.

The rule above announced applies as well to infant as to adult employes: *Daly v. Haller Mfg. Co.*, 48 La. Ann. 214, 19 South. 116; *McMahon v. O'Donnell*, 32 Neb. 27, 48 N. W. 824; *Gillen v. Rowley*, 184 Pa. St. 209, 19 Atl. 504. And the servant is not entitled to recover from the master for injuries thus received, although in point of fact the place, machine, or appliance was at the time in a defective condition: *Central etc. Banking Co. v. Chapman*, 96 Ga. 769, 22 S. E. 273; *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810; *Mitchell Trauter Co. v. Ehmett* (Ky.), 65 S. W. 835; *Wagen v. Minneapolis etc. R. R. Co.*, 80 Minn. 92, 82 N. W. 1107.

II. Application of Rule.—If a servant's regular duties required him to go upon the roof of a mill in which he was employed, and at the time he was injured by the falling of the roof, he was on such roof, not in the discharge of a duty within the scope of his employment, but voluntarily there in the discharge of other duties, his master is not liable, though negligent in permitting the roof to be defective; *Mitchell etc. Co. v. Ehmett* (Ky.), 65 S. W. 834. If a servant, voluntarily, and without being so ordered by his superior, undertakes to operate a dangerous machine with which he is not unfamiliar, which is entirely outside the scope of his regular employment, he is not entitled, in the absence of any emergency, justifying a departure by him from his ordinary line of duty, to recover from his master for injuries thus caused, although, in fact, the machine was at the time in a defective condition: *Central R. R. etc. Co. v. Chapman*, 96 Ga. 769, 22 S. E. 273. So, if an employe thirteen years of age is employed in a work neither difficult nor dangerous, and is injured while voluntarily interfering with a machine in the exclusive charge of another employe, in undertaking

to do something not within the scope of his employment, he cannot recover from his master for injuries received while so employed: *Gillen v. Rowley*, 134 Pa. St. 209, 19 Atl. 504. Or if a girl, thirteen years of age, while operating a straw-cutter, which was no part of her duties to her employer, is injured, she cannot recover, especially if she operated the machine voluntarily and without the knowledge of her employer: *McMahon v. O'Donnell*, 82 Neb. 27, 48 N. W. 824. If a boy, fourteen years of age, employed in a factory to operate a small foot machine, voluntarily leaves his place of work and goes to another part of the factory for the purpose of adjusting a belt connecting one of the machines of the factory with the line of the main shaft, and while thus employed receives fatal injuries, he is acting outside the line of his employment, and his parents cannot recover from his master: *Daly v. Haller Mfg. Co.*, 48 La. Ann. 214, 19 South. 116. If a person employed as a stave-catcher in a factory, a place of little or no danger, in the absence and in violation of the direction of his employer, exchanges his place of work for that of sawyer, an occupation much more dangerous, and while so engaged is injured, he is both outside the line of his employment and guilty of contributory negligence, and therefore not entitled to recover: *Brown v. Byroads*, 47 Ind. 435. If a servant employed around machinery, it being no part of his duty to meddle with the belts connected therewith, which duty is especially in charge of another employé, becomes a volunteer intermeddler in attempting to replace a belt, and is thereby injured, he cannot recover of his master: *Freeberg v. St. Paul Plow Works*, 48 Minn. 99-100, 50 N. W. 1028.

An instructive case as illustrating the general rule that an employé who, as a mere volunteer, does an act outside the scope of his employment, and in consequence receives personal injury, cannot hold the master liable therefor, is *Allen v. Hixson*, 111 Ga. 460, 462, 36 S. E. 810, where the court said: "It affirmatively appears that it was her duty to feed the machine by which she was injured, and it is a legitimate inference that it was also incumbent upon her to inform the superintendent that this machine was out of order. Beyond this it cannot be gathered from her petition that anything more was required of her. It is therefore clear that she was not injured while in the performance of any duty growing out of the service in which she was engaged. It follows that the master was under no duty of protecting her against injuries received while she was, as a mere volunteer, endeavoring to accomplish something entirely outside the scope of her employment. The act which caused her injury was certainly one of this kind, for in taking hold of the unwrapped cloth, for

the purpose of showing the superintendent the condition of the machine, she volunteered to perform a service not required of her, and therefore necessarily acted upon her own responsibility and at her own risk. It makes no difference that the machine had a defective part of which she was ignorant, for its existence could not, on the occasion referred to in her petition, have been the source of injury to her if she had confined herself to the performance of the duties pertaining to the service for which she was employed. As will have been seen, plaintiff was an adult, and actually knew when she approached the machine that it was out of order. Recognizing the danger of attempting to operate it in that condition, she prudently refrained from doing so, and made a prompt report to the superintendent in regard to the matter. Unfortunately, however, she did not continue to exercise the same degree of prudence when she went outside the scope of her duties, and without any direction or request on his part, volunteered to assist him in ascertaining precisely the extent and character of the derangement which had brought about the condition in which she had found the machine": *Allen v. Hixson*, 111 Ga. 463, 38 S. E. 810.

If a railroad employé voluntarily performs a service not within the scope of his duty, he assumes the risk thereof, and cannot recover from the company for an injury received while so engaged: *Houston etc. Cent. R. R. Co. v. Fowler*, 56 Tex. 452. Consequently, it has been frequently decided that it is not within the duties of the employment of a conductor of either a passenger or a freight train to couple or uncouple cars, except in case of pressing emergency, and if he is injured or killed in performing such service, in the absence of such emergency, he assumes the risk, and no recovery can be had against the railroad company: *Sears v. Central R. R. etc. Co.*, 53 Ga. 630; *Kane v. Savannah etc. Ry. Co.*, 85 Ga. 858, 11 S. E. 493; *Whitton v. South Carolina etc. R. R. Co.*, 106 Ga. 796, 32 S. E. 857; *Cumberland Valley R. R. Co. v. Myers*, 55 Pa. St. 288. If a brakeman uncouples cars by hand in violation of a rule known to him not to do so, except with a coupling stick, he performs an act outside the scope of his employment, and assumes the risk: *Richmond etc. R. R. Co. v. Finley*, 63 Fed. 228. Or if a fireman, in the employ of a railroad, was killed while leaning out of the cab of the engine to deliver a postal card to another employé, it is error, in an action for his death, to admit evidence of a custom of the employés of the company to thus deliver mail to one another, it not being within the scope of their employment, and they, while so acting, assuming the risk, and relieving the company from liability: *Texas etc. R. R. Co. v. Taylor* (Tex. Civ. App.), 44 S. W. 892. A regular baggageman on a railroad train having a regular run, who voluntarily assumes to act as baggageman on a special train, is acting outside the scope of

his employment, and cannot recover for injuries received from defective appliances: *Wagen v. Minneapolis etc. R. R. Co.*, 80 Minn 92, 82 N. W. 1107.

III. Direction of Fellow-servant.—If a servant, upon the suggestion of a fellow-servant, without authority from the master to order and control the servant's work and movements, voluntarily leaves his work which in the original contract he is hired to perform, and engages in other or more hazardous work of the master, he is not liable to respond in damages for the consequences: *Pittsburgh etc. Ry. Co. v. Adams*, 105 Ind. 151. In other words, an employer is not liable for injuries to an employé occurring upon work done outside the scope of his employment at the request of another employé who has no authority to make such request. In such case the injured employé is a mere servant volunteer and assumes all the risk: *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38, 1 Am. St. Rep. 22, 13 Pac. 144; *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 839; *Martin v. Highland Park Mfg. Co.*, 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876; *Texas etc. Ry. Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001; *Werner v. Trautwein* (Tex. Civ. App.), 61 S. W. 447. Thus, if an employé in a mill undertakes, of his own free will, to make repairs, outside of his regular duties, on a defective pulley and belt connected with the mill, upon the suggestion of a fellow-workman who has no authority over him, and with the mere consent of his own immediate superior, he cannot recover from his master for any injury received while so employed; *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 23 N. E. 100. If a railroad yard-master is killed while coupling cars by request of an engineer, it being no part of the duty of the yardman to couple cars, no recovery can be had against the railroad company, because in all such cases, to support a recovery it must be shown that the servant injured was in the line of his employment, or was injured by the negligence of a superior servant having control of him: *Bradley v. Nashville etc. Ry. Co.*, 14 Lea, 374. If an employé at the time of receiving an injury is in the performance of duties outside his regular employment by direction of a fellow-workman, he cannot recover from his employer for the injury sustained, especially if want of due care on his own part contributed thereto: *Wormell v. Maine etc. R. R. Co.*, 79 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49. If a minor engaged as a messenger boy by a railway company is requested to go to town and get the mail, and boards a switch train for that purpose, but, at the request of the foreman of the switch crew, uncouples cars, and thereby receives an injury, the foreman having no authority to make the request, the representative of such minor employé cannot recover, because the minor became a volunteer, and by performing an act outside his duties made himself a fellow-servant with such foreman, and assumed

the risks attendant upon his acts: *Texas etc. Ry. Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001.

A railroad company cannot, however, evade liability to a servant who is injured in its employment by the incompetency of a fellow-employé, by showing that plaintiff, at the time of his injury, was not acting in the discharge of duties within the scope of his employment if it was customary for the company's employés to do work other than the regular service assigned to them when ordered to do so by such fellow-employé, and plaintiff was obeying such an order when injured: *East Line etc. Ry. Co. v. Scott*, 68 Tex. 694, 5 S. W. 501.

STATE v. SAIDELL.

[70 N. H. 174, 46 Atl. 1083.]

EVIDENCE.—THE COMPARISON OF A CHILD WITH THE DEFENDANT in bastardy proceedings, as an individual, or with his race, is properly allowed on the issue of establishing the paternity of the child. (p. 628.)

EVIDENCE.—THE ERRONEOUS ADMISSION in evidence of a newspaper article relating solely to a matter not in dispute is harmless and not ground for relief. (p. 628.)

BASTARDY.—EVIDENCE TO REFUTE INSINUATIONS against complainant's character in bastardy proceedings is competent. (p. 628.)

EVIDENCE.—IF PART OF A CONVERSATION is disclosed upon cross-examination, the balance may be stated upon redirect examination, so far as it tends to explain or qualify the portion already elicited. (p. 628.)

BASTARDY—EVIDENCE—TIME OF ACCUSATION.—Evidence elicited to show that the accusation made by the complainant against the defendant in a bastardy proceeding was an after-thought may be rebutted by evidence showing when and under what circumstances the accusation was first made. (p. 628.)

EVIDENCE.—AN INSINUATION ELICITED UPON CROSS-EXAMINATION regarding the conduct of a justice of the peace at a former hearing may be rebutted by evidence that such hearing was conducted in the usual manner. (p. 629.)

APPELLATE PRACTICE.—EXCEPTIONS NOT PROPERLY TAKEN are waived on appeal. (p. 629.)

Bastardy proceedings. Verdict for complainant, and appeal by defendant.

Sargent & Niles, for the plaintiff.

Martin & Howe, for the defendant.

170 PEASLEE, J. 1. The comparison of the child with the defendant as an individual, or with his race, was properly allowed. "Under the well-established physiological law that like begets like, and that generally there is a resemblance, more or less strong and striking, between the parent and his child, it was a fair matter of argument before the jury by the counsel on both sides whether or not there had been anything in the complexion, appearance, and features of the child, which the witness had produced and identified before them, tending to indicate its other parent": *Gilmanton v. Ham*, 38 N. H. 108, 113. Even in those jurisdictions where the rule above laid down is not followed, comparison is allowed in respect to race characteristics. "No one will doubt the propriety or reason upon which these decisions are based, . . . for it is well understood that there are marked distinctions, physical and external, between the different races of mankind, which may enable men of ordinary intelligence and observation to judge whether they are of one race or another": *Clark v. Bradstreet*, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56. The instruction excepted to limited this evidence to its legitimate sphere and was unobjectionable.

2. It would seem that it was proper to allow the newspaper item to be read after the defendant had inquired fully as to its contents. But whether it was so or not is of no consequence, for the item related solely to a matter which was not in dispute. If its admission was erroneous, it was also harmless: *Wait v. Nashua Armory Assn.*, 66 N. H. 581, 49 Am. St. Rep. 630, 23 Atl. 77.

3. Evidence to refute the insinuations against the complainant's character was competent: *Valley v. Concord etc. R. R. Co.*, 68 N. H. 546, 38 Atl. 383.

4. This exception is disposed of by the finding at the trial term: *Wason v. Burnham*, 68 N. H. 553, 44 Atl. 693.

5. The cross-examination of the witnesses as to their conversation with Isaac was designed to impeach their testimony. A part of the conversation having been called for, it was competent to have the whole stated upon redirect examination, so far as it explained or qualified the matters inquired about on cross-examination: *Wentworth v. McDuffie*, 48 N. H. 402.

6. The inquiry of the complainant's father was evidently made for the purpose of showing that she made no accusation against the defendant until this proceeding was commenced. The inference to be drawn from this would be that the charge

against him was an afterthought. It therefore became material to show the time when and the circumstances under which she first made complaint: *Mange v. Holmes*, 7 Allen, 136.

¹⁷⁷ 7. The materiality of evidence concerning the conduct of the justice before whom the preliminary examination was had is not apparent; but, if it was material, the insinuation contained in the defendant's inquiry as to the conduct of the justice was properly rebutted by evidence that the trial was conducted in the usual way: *Valley v. Concord etc. R. R. Co.*, 68 N. H. 546, 38 Atl. 383.

8. This exception is disposed of by the failure of the defendant to properly insist upon it: *Felch v. Weare*, 66 N. H. 582, 27 Atl. 226.

Exceptions overruled.

Pike, J., did not sit; the others concurred.

In *Bastardy Proceedings* a Child of immature age should not be exhibited to the jury to show its resemblance to the defendant: *Clark v. Bradstreet*, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56; *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 489. Though it has been held allowable where the child was over two years old: *State v. Smith*, 54 Iowa, 104, 37 Am. Rep. 192, 6 N. W. 153; but not where it was only nine months: *State v. Harvey*, 112 Iowa, 416, 84 Am. St. Rep. 350, 84 N. W. 535.

Evidence Bearing on the Credibility or bias of witnesses is considered in the extended note to *Lodge v. State*, 82 Am. St. Rep. 25-68.

STATE v. RYAN.

[70 N. H. 196, 46 Atl. 49.]

CRIMINAL LAW—VIOLATION OF STATUTE—INTENT.—

Under statutes expressly prohibiting the commission of an act without reference to the intent or purpose of the person committing it, it being of the class under which he is under no obligation to act unless he knows that he can do so lawfully, it is no defense that he acted honestly and in good faith, under a mistake of fact. (p. 630.)

CRIMINAL LAW—INTENT—VIOLATION OF OLEOMARGARINE STATUTE.—If a person furnishes oleomargarine to a guest in violation of statute, it is no defense that he acted without unlawful intent, and under a mistake of fact. (p. 630.)

Indictment for furnishing oleomargarine, in place of butter, to a guest in a hotel, in violation of a statute prohibiting such act, as done. Verdict against defendant, and he appealed.

J. P. Tuttle, for the plaintiff.

Doyle & Lucier and Wason & Jackson, for the defendant.

¹⁹⁶ BLODGETT, C. J. The instructions requested by the defendant were properly denied.

It is true that "in the earlier history of the common law only such acts were deemed criminal as had in them the vicious element of an unlawful intent, indicating a deviation from moral rectitude; but this quality has ceased to be essential, and now acts unobjectionable in a moral view, except so far as being prohibited by law makes them so, constitute a considerable portion of the criminal code. In such statutes the act is expressly prohibited, without reference to the intent or purpose of the party committing it, and is usually of the class in which the person committing it is under no obligation to act unless he knows he can do so lawfully. Under these statutes it is not a defense that the person acted honestly and in good faith, under a mistake of fact. He is bound to know the fact as well as the law, and he acts at his peril. These statutes do not make a guilty knowledge one of the ingredients of the offense": *State v. Cornish*, 66 N. H. 329, 330, 21 Atl. 180, and numerous ¹⁹⁷ authorities there cited; *State v. Campbell*, 64 N. H. 402-405, 10 Am. St. Rep. 419, and note, 13 Atl. 585; *Commonwealth v. Uhrig*, 138 Mass. 492; *Commonwealth v. Savery*, 145 Mass. 212, 13 N. E. 611; *State v. Smith*, 10 R. I. 258; *State v. Hughes*, 16 R. I. 403, 16 Atl. 911.

The statute in question clearly comes within this class, and having been enacted nearly five years subsequent to the decision in *State v. Cornish*, 66 N. H. 329, 21 Atl. 180, of which the legislature must be deemed to have had knowledge, no room for reasonable doubt remains that the legislative intent was that the statute should be construed in accordance with its language and agreeably to the construction obtaining not only in *State v. Cornish*, 66 N. H. 329, 21 Atl. 180, but in preceding cases.

Exceptions overruled.

Peaslee, J., did not sit; the others concurred.

Criminal Intent.—One who does a thing forbidden by statute is liable to the punishment imposed, though he had no evil intent, unless the statute makes such intent an element of the crime. If a statute has made it criminal to do an act under peculiar circumstances, one who does it under those circumstances is chargeable with the criminal intent of doing it: *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802. One who sells liquor to a

minor, though innocently ignorant of the fact, incurs the penalty of the law prohibiting such sales: *State v. Sasse*, 6 S. Dak. 212, 55 Am. St. Rep. 834, 60 N. W. 853. And in a prosecution for selling oleomargarine, it is not incumbent on the state to show knowledge on the part of the vendor nor an intention to deceive the purchaser: *State v. Rogers*, 95 Me. 94, ante, p. 395, 49 Atl. 564.

STATE v. ALDRICH.

[70 N. H. 391, 47 Atl. 602.]

HIGHWAYS—USE OF.—No person has an absolute right to use for any purpose land acquired for a highway. The state can regulate the public right of travel thereon, so long as such regulation applies alike to all persons, and is reasonable. (p. 631.)

HIGHWAYS—USE OF—CONSTITUTIONAL LAW.—If, under a statute, any person may make the same use of a highway as every other person of the same age, sex, and condition, employing the same mode of travel, it is an equal and constitutional law. (p. 631.)

HIGHWAYS—CONSTITUTIONAL LAW—USE OF BICYCLES.—A statute prohibiting the riding of bicycles on sidewalks by persons over twelve years of age is reasonable and valid, and deprives no one of the equal protection of the law, guaranteed by the national and state constitutions. (p. 631.)

Complaint charging the defendant with having violated the provisions of a statute, prohibiting persons over twelve years of age from riding bicycles upon sidewalks. Verdict of guilty and defendant appealed.

J. P. Tuttle, for the plaintiff.

D. W. Perkins, for the defendant.

³⁹¹ **YOUNG, J.** The fourteenth amendment to the constitution of the United States confers no rights upon the defendant which he does not possess as a citizen of this state, for our constitution secures to every person within its jurisdiction all the rights guaranteed to citizens of the United States by that amendment: *State v. Pennoyer*, 65 N. H. 113, 18 Atl. 878.

No person has an absolute right to use for any purpose land acquired for a highway; but as the state holds lands acquired for the ³⁹² purpose of a highway in trust for the benefit of the public, so its right to legislate in regard to the use of highways is subject to the same limitations as its right to legislate in re-

spect of other public matters; and a statute regulating the public right of travel, to be constitutional, must apply alike to all persons, and should be reasonable: *State v. Manchester etc. R. R. Co.*, 69 N. H. 35, 49, 38 Atl. 736.

The fact that everyone has an equal right to use the highways does not mean that any person can use all parts of them for all known modes of travel, for the state may lawfully appropriate public property for a particular use, or for the use of a class of its citizens, as land for a public school, or the sidewalks for a class of travelers. When any person may make the same use of a highway as every other person of the same age, sex, and condition, employing the same mode of travel, it is an equal law: *State v. Griffin*, 69 N. H. 1, 29, 76 Am. St. Rep. 139, 39 Atl. 260. So this statute, which appropriates a part of the highway to the use of pedestrians and children, is not open to the objection that it deprives the defendant of the equal protection of the law, for he has the same right to use any highway in this state that any other person of the same age, using the same mode of travel, has. A statute, to be objectionable as class legislation, must deny to some privileges which it permits others of the same class to enjoy: *Slaughter-house Cases*, 16 Wall. 36; *Missouri v. Lewis*, 101 U. S. 22; *Davis v. Massachusetts*, 167 U. S. 43, 17 Sup. Ct. Rep. 731. Unless it can be said as a matter of law that this statute is an unreasonable regulation of the public right to use the highways, the defendant's exception must be overruled.

Highways are used by a great number of people traveling on foot, on bicycles, in wagons, carriages, and street-cars, propelled by animals, electricity, and steam; and the problem presented to the legislature was to so regulate this travel that all the different modes could be carried on in the same highway with reasonable safety and dispatch. While the regulations which the legislature may lawfully make for effecting this purpose should be reasonable, it will not be necessary to consider under what circumstances, if ever, the court will revise legislative discretion, and declare a law void, because it is unreasonable. The manifest purpose of this statute was to protect persons on the sidewalk from being injured by the riders of bicycles; and an important fact to be considered on the question of whether the rider was likely to injure such persons was his ability to do so, for it is plain that it would be idle to forbid a person to ride a bicycle on the sidewalk in order to prevent his injuring pedestrians if he was physically incapable of injur-

ing them. While it is clear that little children could not, and that adults could, propel bicycles with sufficient force to inflict serious injuries upon those with whom they come in contact, it is by no ³⁹³ means clear at what age a particular child will acquire such ability to injure pedestrians that it becomes a menace to the public safety for him to ride a bicycle on the sidewalk. So, although this statute makes a child's age and not his ability to inflict injury the test to determine whether or not he may ride a bicycle on the sidewalk, it cannot be said, as a matter of law, that this is an unreasonable regulation of the public right of travel or an arbitrary exercise of legislative power; for it is not a matter of common knowledge that children under twelve years old are able to propel bicycles with sufficient force to cause such injuries as this statute was intended to prevent.

Exception overruled.

Peaslee, J., did not sit; the others concurred.

Legislation in Regard to Highways is an exercise of the police power, and need not be uniform throughout the state: *State v. Sharp*, 125 N. C. 628, 74 Am. St. Rep. 663, 34 S. E. 264. A state has power to regulate the actions of all persons in their use of highways; *City Council v. Parker*, 114 Ala. 118, 62 Am. St. Rep. 95, 21 South. 452. The legislature may regulate the use of a highway, restrict it to particular vehicles, or to the use of a particular motive power: *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758. As to the power of a city to regulate the use of vehicles in its streets, see *Ex parte Battis*, 40 Tex. Cr. Rep. 112, 76 Am. St. Rep. 708, and cross-reference note thereto, 48 S. W. 513.

Bicycles may be Excluded from Public Highways by authority of the legislature if, in fact, they are dangerous to the general traveling public: *Twilley v. Perkins*, 77 Md. 252, 39 Am. St. Rep. 408, 28 Atl. 286. Bicycles are vehicles and entitled to the use of the road, but have no lawful right to the use of the sidewalk: *Holland v. Barch*, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83.

MORRISON v. BURGESS SULPHITE FIBRE COMPANY.

[70 N. H. 406, 47 Atl. 412.]

MASTER AND SERVANT.—THE DUTY OF A MASTER TO FURNISH A SAFE AND SUITABLE PLACE for his servants to do their work in extends only to such portions of the premises as he has prepared and designed for their occupancy while doing his work, and to such other parts as he knows, or ought to know, they are accustomed to use while doing it. (p. 634.)

MASTER AND SERVANT—DUTY TO FURNISH SUITABLE TOOLS.—A master is under no duty to furnish his servants with suitable tools, when they put them to uses for which they were not intended, knowing their intended uses. (p. 634.)

MASTER AND SERVANT.—A MASTER SETS A TRAP FOR HIS SERVANT only when he invites him into a dangerous situation, or creates or suffers one to exist in a place where he knows, or ought to know, his servant is likely to go. (p. 634.)

E. Foster, for the plaintiff.

Drew, Jordan & Buckley, Chamberlin & Rich, and O. D. Baker, for the defendants.

408 YOUNG, J. The plaintiff says the defendants failed to perform the duty the law imposed upon them for his benefit, both in respect of furnishing him a safe place in which to work and suitable tools and appliances for his use. Although it is the master's duty to use ordinary care to keep his premises in such condition that his servants can perform their work in safety, or to notify them of dangers to which they are exposed, and to furnish them with tools and appliances suitable for the purposes for which they are provided, or to notify them of the defects in those furnished, there was no evidence that they failed to perform any of these duties. If this elevator was a part of their premises, they owed him no duty to so cover it, that he could safely use it as he did. They did not put the coverings on their elevators for their servants to stand on, and it did not appear that they ever before had been used in that way. A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it: *McGill v. Maine etc. Granite Co.*, 70 N. H. 125, ante, p. 618, 46 Atl. 684. If this elevator was a tool or appliance, the defendants owed the plaintiff no duty respecting it at the time of the accident, for he was then

putting it to a use for which he knew it was not intended; and although it is a master's duty to use due care to furnish his servants tools and appliances suitable for the purpose for which they are provided, he owes them no such duty when they put his tools to uses for which they were not intended: *Young v. Boston etc. R. R. Co.*, 69 N. H. 356, 41 Atl. 268.

There is no force in the plaintiff's claim that the defendants set a trap for him when they covered this part of their elevator with canvas, and did not tell him of the fact, for a master sets a trap for his servant only when he invites him into a dangerous situation, or creates or suffers one to exist in a place where he knew, or ought to know, his servant is likely to go: *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 87 Am. Dec. 644. The case does not show that the defendants either intended for the plaintiff to use this elevator as he did, or knew, or were in fault for not knowing, that he was likely to do so. A person is not in fault for not knowing particular facts unless circumstances exist which would put a man of average prudence upon inquiry (*Shea v. Concord etc. R. R. Co.*, 69 N. H. 361, 41 Atl. 774), and no such circumstances were shown.

⁴⁰⁹ The plaintiff's situation would have been no different if the defendants, instead of putting him to work on the bridge-tree, had set him to paint the mill, and he had hung his stage from a gutter, which they knew was insecurely fastened, but which he supposed was secure, and his stage had fallen and injured him. It is clear that these facts would be no evidence of their failure to perform any duty the law imposed on them for his benefit; for although it is a master's duty to set no trap for his servant, leaving a gutter insecurely fastened would not amount to that, unless they intended for him to hang his stage from it, or knew, or were in fault for not knowing, that he was likely to do so. The mere fact that the gutter was where he could use it for that purpose would neither be evidence that it was put there for him to hang his stage from, nor that they ought to have known that he was likely to do so. But, if, in addition to these facts, it appeared that painters were accustomed to use gutters in this way, it would have been for the jury to say whether or not the defendants ought to have anticipated that he would do so. If the jury had found that the defendants ought to have known that he would use it, they could then say a trap was set for him, when the defendants left the gutter as they did; for that would be finding that they suffered a dangerous situation to exist upon a part of their premises,

which they knew their servants were accustomed to use in doing their work. But that is not this case, for there was no evidence that the plaintiff or anyone else ever used any of the defendant's elevators in the way he was using this when the accident happened.

If the fact that the elevator happened to be where he could stand on it, and do his work, was evidence, either that the defendants intended for him to use it as he did, or that they were in fault for not knowing that he was likely to do so, every master who leaves any implement upon his premises which his servants cannot safely use for every purpose which suits their convenience, regardless of that for which it was provided, sets a trap for them. In that event, the master's duty in this respect would not be limited to using ordinary care to furnish his servants with tools and appliances suitable for the purpose for which they were provided, but it would be his duty to furnish such tools and appliances as his servants could safely use for any purpose which suited their fancy.

The mere fact that the plaintiff could stand on this elevator and remove the obstruction from the face of the supporting timber would no more justify him in believing that it was put there for that purpose, or make it the defendants' duty to anticipate that he would so use it, than the single fact that a painter could reach the ceiling of a room he was painting by standing upon a table, ⁴¹⁰ which formed a part of its furniture would either justify him in believing it was put there for that purpose, or make it the duty of the owners of the house to anticipate that he would do so. If he so used it, and was injured, because of a defect in its construction, of which they knew but did not notify him, there would be more force in a claim that they set a trap for him when they left this table in the room, notwithstanding it was a part of the furniture, and they had no reason to anticipate that he would stand upon it, than in the plaintiff's claim that the defendants set a trap for him when they failed to notify him that this part of their elevator was covered with canvas; for, in addition to its being a part of the machinery of their mill, and there being nothing which made it their duty to anticipate that he would use it as he did, its surface sloped at so great an angle that they might well have thought it was a physical impossibility for him to stand upon it.

Exception sustained; judgment for the defendants.

Pike, J., did not sit; the others concurred.

The Duty of a Master to Furnish a Safe Place in which his servant is to work is limited to the premises where he is required for the purposes of his employment to be: *Kennedy v. Chase*, 119 Cal. 637, 63 Am. St. Rep. 153, 52 Pac. 83. See, too, *Martin v. Highland Park Mfg. Co.*, 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876.

A Master Who Furnishes His Servant with Machinery and appliances reasonably safe when used in the manner they are intended to be used, but which may become dangerous if their use is perverted by the servant, is not deemed guilty of negligence: *Grattis v. Kansas City etc. Ry. Co.*, 153 Mo. 380, 77 Am. St. Rep. 721, 55 S. W. 108.

GOOCH v. EXETER.

[70 N. H. 413, 48 Atl. 1100.]

CONSTITUTIONAL LAW—POWER TO APPOINT POLICE OFFICERS.—A statute creating a board of police commissioners for a town, to be appointed by the governor, and authorizing them to appoint, remove, equip, and fix the pay of police officers, is not unconstitutional as taking from the town control of local affairs to which it is entitled, nor as subjecting its inhabitants to unjust and unequal taxation without representation. (p. 637.)

MUNICIPAL CORPORATIONS — POLICE OFFICERS — POWER TO APPOINT.—The legislature may delegate to towns or town officers authority to select and fix the compensation of police officers for their respective localities, or place upon them the duty of doing so. (p. 638.)

OFFICERS—POWER TO FIX COMPENSATION.—Power to appoint police officers and set forth their duties includes power to fix the compensation that they are entitled to recover. (p. 641.)

A. O. Fuller, for the plaintiff.

Eastman & Hollis and Frink & Marvin, for the defendants.

413 CHASE, J. The statute creates a board of police commissioners for the town of Exeter, consisting of three members, appointed by the governor, with the advice and consent of the council. The board is empowered to appoint, remove, and equip the police officers of the town, and fix their pay, and to make and enforce reasonable rules for their government. The police force is to consist of regular officers, not exceeding five, and of special officers as occasion requires. They hold office during the pleasure of the board, possess the powers of police officers and constables, and are to be paid by the town: Laws 1895, c. 188.

The defendants challenge the constitutionality of the statute on these grounds: That it takes from the town control of local

affairs to which the town is entitled; that it subjects the inhabitants of the town to taxation without representation; and that the taxation so imposed is unequal and unreasonable.

The constitution confers upon the general court power "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering ⁴¹⁴ thereof, and of the subjects of the same, for the necessary support and defense of the government thereof; and to name and settle, . . . or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits of the several civil and military officers of this state; . . . and to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within, the said state, and upon all estates within the same": Const., pt. 2, art. 5. These terms are sufficiently comprehensive to include power to enact a statute like the one under consideration. Police officers are civil officers. Their principal duty is to assist in the preservation of the public peace—a matter of public concern. They are state or public officers—not town or private officers: 1 Dillon on Municipal Corporations, secs. 58, 60, 210. The election or appointment of such officers is not provided for in the constitution otherwise than by the grant to the general court of power to "name and settle, . . . or provide by fixed laws for the naming and settling," of all civil officers within the state. The legislature may delegate to towns or town officers authority to select police officers for their respective localities, or place upon them the duty of doing so: *State v. Noyes*, 30 N. H. 279. Although the power of delegation is not expressly granted by the constitution, it "is implied from the principle of local self-government": *Gould v. Raymond*, 59 N. H. 260, 276; *State v. Hayes*, 61 N. H. 264. The legislature may withdraw, at will, authority thus delegated or imposed, and exercise it directly or through other agencies: *State v. Griffin*, 69 N. H. 1, 30, 76 Am. St. Rep. 139, 39 Atl. 260, and authorities cited. While a town possesses the authority, its right to the authority is the right of an agent, not that of an owner. As parts of the governmental machinery (*Wooster v. Plymouth*,

62 N. H. 208, 209), towns may be intrusted with the authority or required to exercise it, but they cannot demand it.

The legislature has made provision for having police officers or constables in all towns. Authority is given to towns and cities generally to elect or, through their officers, to appoint such officers, and to regulate local police affairs: Pub. Stats., c. 43, sec. 25; Pub. Stats., c. 48, sec. 15; Pub. Stats., c. 249. Early in the history of the state the legislature began to exercise its power over such matters directly in reference to particular places. In 1807 an act was passed for regulating the police in the town of Portsmouth: Laws 1811, p. 74. The act of June 28, 1823, required the selectmen of Portsmouth to appoint annually not exceeding seven police officers, and prescribed certain police offenses for the town. It went into effect in Portsmouth, without action by the town, and other towns⁴¹⁵ were authorized to adopt any of its provisions: Laws 1824, p. 80. It affords a good illustration of the exercise of legislative power, both directly and indirectly. Recently, acts have been passed establishing boards of police commissioners for particular cities and towns, and giving the boards control over local police matters: Laws 1893, cc. 182, 202; Laws 1895, cc. 162, 188, 205. These special statutes seem to create an inequality in the rights and privileges enjoyed by towns and cities; but when it is considered that the corporations have no inherent rights in the matter of electing or appointing police officers and prescribing police regulations, the seeming inequality fades away. It was said by Carpenter, C. J., in *State v. Griffin*, 69 N. H. 1, 30, 76 Am. St. Rep. 139, 39 Atl. 260: "The equality of the constitution is the equality of persons and not of places—the equality of right and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, and inflicts equal penalties on every person who violates it, is an equal law, though no one can enjoy the right, be subjected to the burden, or infringe its provisions, without going to, or being in, a particular part of the state. It does not discriminate in favor of some at the expense of others." The circumstances pertaining to a town—its size, the character of its inhabitants, the public sentiment prevailing among them, the nature and extent of the business carried on in the town, its educational and other institutions, its situation with reference to other communities—these or other circumstances may make it advisable that the agencies for preserving the public peace in it should differ from those employed generally.

Whether legislation of this character in a particular case "be wise, reasonable, or expedient, is a legislative, and not a judicial, question": *State v. Marshall*, 64 N. H. 549, 550, 15 Atl. 210; *State v. Griffin*, 69 N. H. 1, 31, 76 Am. St. Rep. 139, 39 Atl. 260.

Dillon says: "It has been several times determined that the legislature may, unless specially restricted in the constitution, take from a municipal corporation its charter powers respecting the police and their appointment, and by statute itself directly provide for a permanent police for the corporation, under the control of a board of police not appointed or elected by the corporate authorities, but consisting of commissioners named and appointed by the legislature": 1 *Dillon on Municipal Corporations*, sec. 60. See, also, *Cooley's Constitutional Limitations*, 6th ed., 203, 227-230, 281, 282; *People v. Common Council*, 28 Mich. 228, 235, 236, 15 Am. Rep. 202; *Mayor etc. of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *State v. Covington*, 29 Ohio St. 102; *Police Commissioners v. Louisville*, 3 Bush, 597; *State v. St. Louis County Court*, 34 Mo. 546; *State v. Hunter*, 38 Kan. 578, 582, 583, 17 Pac. 177; *State v. Seavey*, 22 Neb. 454, 35 N. W. 228. A statute of Massachusetts, creating a board of police commissioners for the city of Boston, in all essential particulars like the statute under consideration, was ⁴¹⁶ held to be constitutional under a provision almost literally the same as that of the constitution of this state: *Commonwealth v. Plasted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224.

The objection that the statute subjects the inhabitants of the town to taxation without representation is not tenable. Presumably, Exeter was represented in the general court which enacted the statute: See *People v. Mahaney*, 13 Mich. 481, 500. Nor is the town subjected by the statute to unequal or unreasonable taxation within the meaning of the constitution. In common with all other towns of the state, it is required to bear its proportional share of the burden of preserving the public peace. It cannot decline to perform the duty nor refuse to raise the necessary taxes for the purpose: *Cooley's Constitutional Limitations*, 282. This burden is not distributed by apportioning to towns taxes to provide money with which to meet the expense, but by requiring towns to support the local officers reasonably necessary for preserving the peace within the town limits. This statute requires Exeter to pay the police officers necessary for the town, and other statutes, general and special, require the

other towns of the state to pay the corresponding officers in their towns respectively.

The duty in this matter closely resembles that in regard to highways: Cooley on Taxation, 476-478. Towns are bound to build and maintain, wholly or partially, the highways within their borders, although laid out without their consent or even against their strenuous opposition. If the selectmen laid out any of the highways, they acted not as town agents, but as public officers. The only voice towns had in deciding whether they would assume the burden was in the legislature, through their representatives, when the statutes which imposed it were under consideration. The money raised by towns for the repair of highways is largely expended by public officers over whose action towns have no control: Laws 1893, c. 29; Laws 1899, c. 29; Ball v. Winchester, 32 N. H. 435, 440; Hardy v. Keene, 52 N. H. 370; Gross v. Portsmouth, 68 N. H. 266, 267, 73 Am. St. Rep. 586, 33 Atl. 256. It is said in a recent case in Massachusetts, where, as previously remarked, the constitutional provision is similar to that of this state: "No doubt the legislature might provide for the appointment of public roadmasters entirely independently of the towns, and still require the towns to pay the expenses of keeping the roads in repair": In re Kingman, 153 Mass. 566, 575, 27 N. E. 778. The burdens thus placed upon towns are not exactly equal. Some towns have relatively a longer line of highways in the aggregate, or highways that are more expensive to maintain, than other towns. But this method of apportioning the public duty of maintaining highways has been practiced from the early history of the state, and does substantial justice. And so towns are bound ⁴¹⁷ to pay local police officers, although they have no direct voice in the appointment of the officers, and although the public burden is not thereby distributed in mathematical proportion.

If the plaintiff had been elected by the town or appointed by its selectmen under legislative authority, probably no question would be made regarding the obligation of the town to pay for his services. The transaction then would have the appearance of an employment of the plaintiff by the town; it would have the semblance of a contract. Yet when it is considered that the seeming employment is not such in fact, but is the designation of a person to perform the duties of a public office, and that it is made by the town, not on its own account, but as an agent of the state, the immateriality of the town's act upon the question of its obligation to pay for the officer's services

becomes apparent. The obligation does not arise from a contract, but, like the obligation to build and repair highways, is imposed by the general court: 1 Dillon on Municipal Corporations, secs. 73, 74.

The pay of an officer is an incident of his office. Obviously, power "to name and settle" an officer and set forth his duties includes power to fix his compensation. The general court may fix the compensation directly, or delegate authority to fix it, to a governmental agency. The salaries of county solicitors, sheriffs, and county treasurers are instances in which the compensation of public officers has been established directly by the legislature, although paid from the county treasuries: Pub. Stats., c. 286, secs. 17-20. The county conventions have no voice whatever in the matter. The salaries of the judges of police courts in cities are generally fixed by the same authority, although payable from the city treasuries. The act establishing the board of police commissioners of Portsmouth provides that the compensation of the marshal shall be one thousand dollars a year, and of the other police officers two dollars and fifty cents a day, to be paid by the city: Laws 1895, c. 162, sec. 4. The acts relating to Concord, Manchester, and Laconia, respectively, delegate to the city councils of the city authority to fix the pay of officers appointed under them, and provide that the amounts so expended shall not exceed the amounts appropriated for the purpose: Laws 1893, c. 182, sec. 8; Laws 1893, c. 202, sec. 5; Laws 1895, c. 205, sec. 8. The act under consideration delegates the authority to the board of commissioners: Laws 1895, c. 188, sec. 5. There appears to be nothing in this fact that renders the act unconstitutional.

Case discharged.

Young, J., did not sit; the others concurred.

The Appointment of Public Officers by designated associations, corporations, or persons may be authorized by the legislature: See the monographic note to *People v. Freeman*, 13 Am. St. Rep. 180; *Overshiner v. State*, 156 Ind. 187, 83 Am. St. Rep. 187, 59 N. H. 408. As to the constitutionality of statutes providing for police boards or commissioners, see *Mayor v. State*, 15 Md. 376, 74 Am. Dec. 572; *State v. Blend*, 121 Ind. 514, 16 Am. St. Rep. 411, 23 N. H. 511.

LANE v. CONCORD.

[70 N. H. 485, 49 Atl. 687.]

NUISANCE—BURDEN OF PROOF.—On the issue as to whether a municipal corporation has created a nuisance by dumping refuse material upon a vacant lot adjacent to plaintiff's premises, the burden of proof is upon plaintiff to prove that such acts were injurious to health, or wrongfully injured or damaged him or his estate, and that such use of the premises is unreasonable. (p. 643.)

NUISANCE—EVIDENCE.—A CITY ORDINANCE prohibiting the acts complained of is competent, but not conclusive, evidence, on the question of whether they create a nuisance. (p. 644.)

NUISANCE.—USE OF PROPERTY TO CREATE a nuisance must be such as to produce a tangible and appreciable injury to adjoining property, or such as to render its enjoyment specially uncomfortable or inconvenient. (p. 645.)

NUISANCE.—UNSIGHTLY APPEARANCE OF A VACANT LOT, caused by its being used as a dumping ground for refuse material, does not of itself constitute it a nuisance to an adjoining owner nor entitle him to damages. (p. 645.)

Complaint against a municipal corporation, for creating a nuisance by dumping refuse material upon a vacant lot adjoining plaintiff's premises, in violation of a city ordinance. Verdict for defendant. Plaintiff appealed.

Eastman & Hollis and H. J. Brown, for the plaintiff.

Sargent, Niles & Morrill, for the defendants.

487 **BLODGETT, C. J.** The plaintiff's action was not for an alleged violation of the ordinance, but for the creating of a nuisance to her injury. To maintain her action, it was incumbent on her to establish the propositions that the defendants committed the acts complained of, and that such acts wrongfully injured and damaged her in her person or estate. But in the determination of the latter issue, the ordinance was merely competent evidence to be considered by the jury, in connection with all the circumstances of the case, on the question of the defendants' liability (State v. Boston etc. R. R. Co., 58 N. H. 408, 410; Brember v. Jones, 67 N. H. 374, 30 Atl. 411; Bly v. Nashua Street Ry. Co., 67 N. H. 474, 478, 68 Am. St. Rep. 681, 32 Atl. 764, and cases cited), unless a different rule is applicable to them than that to which others are subjected, which we do not understand to be so. The ordinance not being conclusive as to others violating its provisions, there would seem to be no

sound reason why it should be held to be conclusive as to the defendants. If the city councils were to be regarded as mere private agents of the defendants, it might be otherwise. But they are not to be so regarded. "They are public officers, having their duties prescribed by law for the general welfare," and, therefore, as such officers, the passage of the ordinance by them in the performance of these duties imposed no different liability upon the defendants than it did upon others: See *Rossire v. Boston*, 4 Allen, 57, 58; *Smith v. Epping*, 69 N. H. 558, 560, 45 Atl. 415. It follows that if the defendants' acts were in violation of the ordinance, it would not as matter of law entitle ⁴⁸⁸ the plaintiff to a recovery; and if it would not, the requested ruling, that the ordinance was conclusive on the question of reasonable use, was properly refused.

The instruction as to the legal meaning and effect of the ordinance was correct. The plaintiff's ground of complaint to it is, that under it she was compelled to establish that the substances deposited on the lot by the defendants were injurious to health, in order to get any benefit from the ordinance, even as evidence bearing on their reasonable use. This imposed no wrongful burden upon her. If, as is claimed in her behalf, the ordinance was passed under the legislative authority conferred by section 10, chapter 50, of the Public Statutes, the only specific and definite authority granted which affects this case is "to prohibit any person from bringing, depositing, or leaving within the city any dead carcass or unwholesome substance." But this prohibition evidently applies only to those substances which injuriously cause injury to health. Whether the legislature might have gone further and included all the substances enumerated in the ordinance, it is therefore unnecessary to inquire. It is enough for the present purpose that it has not done so, and consequently the entire ordinance has not, as contended by the plaintiff, "all the force and effect of a statute."

It is elementary that ordinances, other than those passed by virtue of an express grant or power, must be reasonable and not oppressive, and that when they are in contravention of a common right they are void. So tested, the sweeping effect of the ordinance in hand claimed by the plaintiff cannot be sustained upon the facts before us. It would be a clear and direct restraint upon and invasion of the right of property, and an unreasonable infringement of private rights, without any compensating advantages, by depriving the lot owner of his rea-

sonable and common right of filling, grading, improving, and beneficially enjoying it, and therefore the ordinance can be sustained only for the preservation of the public health. "When an ordinance is entire, each part being essential and connected with the rest, the invalidity of one part renders the whole invalid; but when it consists of several distinct and independent parts, as when [as in the present case] it prohibits disjunctively two or more acts, the invalidity of one part does not affect the validity of others": 17 Am. & Eng. Ency. of Law, 265, 266. The true test to be applied to the defendants' acts, aside from their effect on the public health, was their reasonableness or unreasonableness under all the circumstances (*Ladd v. Granite State Brick Co.*, 68 N. H. 185, 186, 37 Atl. 1041); and this was the test applied at the trial.

For injuries which unavoidably result from the ordinary use of property, no nuisance can arise; and, as a general rule, every person has the right to subject his property to such uses as will, in ⁴⁸⁹ his judgment, best subserve his interests. This rule has its exception, however, for it is doubtless true that everyone is bound to make a reasonable use of his own property so as to occasion no unnecessary damage to others; but what constitutes such a use cannot be precisely defined, and must depend upon the circumstances of each case. Nevertheless, we think it may be stated as a general doctrine that, in order to constitute a nuisance from the use of one's property, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable and inconvenient: See *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567, 572; *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. St. 401; *Rhodes v. Dunbar*, 57 Pa. St. 274, 98 Am. Dec. 221; *Wahle v. Reinbach*, 76 Ill. 322; *Barnes v. Hathorn*, 54 Me. 124; *Columbus etc. Coke Co. v. Freeland*, 12 Ohio St. 392; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. App. 705.

In this view of the law, as well as of the use to which the lot was subjected by the defendants and the occasion for such use, we are of opinion the jury were properly instructed that the unsightly appearance of the lot was not a cause entitling the plaintiff to damages, and that unless she was injured by gases or something else coming from the city lot onto her premises, she had no right to complain. Unless "gases or something else" did come upon her land from that lot, it is not perceived

how she could have suffered any legal injury from the substances deposited thereon, for it is apparently well settled that the unsightly condition of one's premises does not of itself afford a right of action to a more æsthetic adjoining owner: Wood on Nuisances, 2d ed., 4-6, 15, 16, and authorities cited. Persons living in cities or other thickly settled communities must necessarily suffer some discomforts and annoyances from each other; but for these they are supposed to be fully compensated by the advantages incident to such communities.

Exceptions overruled.

Chase, J., did not sit; the others concurred.

A Nuisance is Anything Done to the Hurt or Annoyance of the lands, tenements or hereditaments of another: Laffin etc. Powder Co. v. Tearney, 131 Ill. 322, 19 Am. St. Rep. 34, 23 N. E. 839; Metzger v. Hochrein, 107 Wis. 267, 81 Am. St. Rep. 841, 83 N. W. 308. To constitute a nuisance, the use of the property must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient: Campbell v. Seaman, 68 N. Y. 568, 20 Am. Rep. 567.

Nuisance.—A municipal corporation is no more exempt from liability in case it creates a nuisance than is an individual: Winchell v. Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668.

BANK COMMISSIONERS v. GRANITE STATE PROVIDENT ASSOCIATION.

[70 N. H. 557, 49 Atl. 124.]

JUDGMENTS—PROPERTY IN ANOTHER STATE.—A judgment in a state court, in which ancillary administration in insolvency is had, is conclusive in another state where the primary administration is had, so far only as it relates to the property in the former state, although the primary assignee in insolvency was a party to the proceedings in such other state. (p. 648.)

INSOLVENCY.—NONRESIDENT CREDITORS of an insolvent corporation participating in the distribution of a fund set apart for them may prove their claims for unpaid balances in an insolvency proceeding against the same corporation in another state. (p. 650.)

INSOLVENCY.—NONRESIDENT CREDITORS of an insolvent corporation, participating in the distribution of a fund held for their benefit by an ancillary assignee in insolvency in another state, are entitled to share in a general distribution of the assets of the corporation in the state of the primary insolvency administration, to the extent of equalizing the whole amount paid them with the whole amount paid to domestic creditors. (p. 652.)

J. Hatch, for the plaintiffs.

Taggart & Bingham, for the assignee.

H. E. Loveren, Lexow, Mackellar & Wells, H. S. Bandler, and H. W. Hayes, for the receivers.

Drury & Hurd, for the shareholders.

E. I. Baker, for the assignees of certificate holders.

558 CHASE, J. The defendants were incorporated in this state in 1881, and were authorized, among other things, to carry on the business of a building and loan association: Laws 1881, c. 233. Upon petition of the plaintiffs, David A. Taggart was appointed assignee of their property and effects, March 18, 1896, under the provisions of section 15, chapter 162, of the Public Statutes. He accepted the trust and has substantially converted all the assets in his possession into cash. The defendants did business in twenty-four states, and ancillary receivers were appointed in sixteen of them. These receivers have also substantially converted the assets received by them into cash. Some of them are ready and willing to remit their balances of cash above expenses, etc., to the assignee; some have refused to remit; and some are undecided whether they will remit or not.

The assignee has on hand a sufficient sum of money to pay the expenses of administration in this state and the debts that have been proved here, and leave a balance for distribution among shareholders. The shareholders number over twenty thousand. More than three thousand of them reside in New York. The defendants deposited one hundred thousand dollars with the New York superintendent of banks, in compliance with the provisions of the banking law of the state, in order to secure the privilege of doing business there. An ancillary receiver in that state was appointed in an action brought by the attorney general in behalf of the people, for the sequestration and preservation of the assets and property of the defendants in the state, and for an equitable distribution of the same among the persons entitled thereto. Taggart appeared in the action and claimed that the funds collected by the receiver should be paid to him for distribution. The receiver has realized about sixty-nine thousand dollars from the sale of real estate located there, and from collections upon mortgages and other obligations due from parties in that state, sent to him by the assignee un-

der authority given by this court. He also has received from the superintendent of banks the one hundred thousand dollar above mentioned. For convenience, the first-named sum is hereinafter designated as the general fund, and the last named as the special fund. Creditors residing in New York have claims amounting to nearly one hundred and seventeen thousand dollars, and the aggregate par value of the shares of shareholders residing there is upward of two hundred thousand dollars. The court of that ⁵⁵⁰ state has adjudged that the receiver pay to Taggart the general fund, less costs, etc., upon his giving an undertaking with sufficient sureties, in a sum double the amount so paid, to pay the New York creditors and shareholders the same rates of dividend that are awarded to other creditors and shareholders throughout the country, without deduction on account of payments to the former of dividends from the special fund; or, in default of so doing, to return the general fund to the New York receiver. As to the special fund, the court decreed that after deducting costs, etc., it should be applied first to the payment of the balance, if any, due New York creditors, and then to the payment of New York shareholders in proportion to their respective claims until paid in full, and finally, if any balance was left, to pay it to the assignee.

1. One question raised relates to the effect of the decision in the New York case: *People v. State Provident Assn.*, 161 N. Y. 492, 55 N. E. 1053. Is this court bound to distribute the fund within its control so that New York shareholders shall receive the same percentage thereof that shareholders outside that state receive, notwithstanding the New York residents, according to that decision, are entitled to additional payments from the funds in that state?

It has been decided by the United States supreme court that a judgment in a state court against a person appointed receiver ancillary to an appointment by a court of another state, binds only the property that is in his custody as receiver within the state in which the judgment is rendered: *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773. In the opinion it is said (140 U. S. 272, 11 Sup. Ct. Rep. 778): "Whatever orders, judgments or decrees may be rendered by the courts of another state, in respect to so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another state come within the same rule of conclusive-

ness. Beyond this, the proceedings of the courts of a state in which ancillary administration is held are not conclusive upon the administration in the courts of the state in which primary administration is had. And this rule is not changed, although a party whose estate is being administered by the courts of one state permits himself or itself to be made a party to the litigation in the other."

This court, then, is bound by the New York decision so far as it relates to the property within the limits of that state, and no further. The appearance of the assignee in the action did not enlarge its binding effect here, for the reason, if for no other, that the issue alleged, heard, and decided in the action related solely to the rights of the parties in the property located in that state.

The decision as to the general fund was that all the creditors of ⁵⁶⁰ the corporation, wherever residing, are entitled to have it distributed among them "upon principles of perfect equality." Upon this point the court say, citing *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. Rep. 165, in support of the proposition: "The courts of one state have no right to favor domestic creditors in the distribution, but it must be made upon the principle that equality is equity." The decision as to the special fund was that it was a trust fund set apart by the defendants for the benefit of the creditors and shareholders residing in New York. The decision is based upon the provisions of the local statute, in compliance with which the defendants deposited the fund with the superintendent of banks to obtain the privilege of doing business in the state. The court say "that by the act of the corporation itself, in availing itself of the benefit of the statute, it has devoted this fund to the benefit of the domestic creditors and shareholders; at least so far as to enable them to receive payment upon all their obligations in full. Therefore, the application of the fund to their benefit in the first instance does not infringe upon the provision of the federal constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The condition imposed upon the transfer of the general fund to this state was not complied with, and the fund remains in the possession of the New York receiver. Consequently, the question before the court is not attended with complications that might arise if the general fund had been received by the assignee upon the terms stated in the New York judgment.

The defendant corporation was incorporated in this state; this was its corporate home. Creditors and shareholders of the corporation, when they became such, wherever the transaction took place, impliedly agreed that in case of insolvency the final settlement of the corporation's affairs should be made in this state and be governed by the laws of the state: *Canada Southern Ry. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. Rep. 363; *Hawkins v. Glenn*, 131 U. S. 319, 331, 332, 9 Sup. Ct. Rep. 739. The provisions of the statute of this state relating to the insolvency of an institution of this kind (Pub. Stats., c. 162, secs. 12-25) form a complete system of insolvency law, under which the property of the institution may be placed in the custody of the law, converted into money, and divided among its creditors, and the corporation practically dissolved. In a case decided at this term (*Bank Commrs. v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113), it was held that the legislature intended that the bankruptcy rule, so called, should apply in the proof of secured claims in a proceeding under these provisions; that is, that such a creditor should be allowed to prove only the balance of his claims above the value of his securities. Applying this principle to the case in hand, and giving the decision ⁵⁶¹ in *People v. State Provident Assn.*, 161 N. Y. 492, 55 N. E. 1053, full effect, it follows that the creditors and shareholders residing in New York are entitled to prove in this proceeding only the balances of their claims above the payments to which they are entitled under the New York decision. This would have been the result if they had resided in this state and the special fund had been pledged to them collectively as security for the payment of their respective claims. It is said by the New York court that the transaction by which the fund was lodged with the superintendent of banks was "something more than a mere deposit as security"; that it was "in the nature of a fund held in trust for the benefit of domestic creditors and shareholders." Stating the proposition in another form, the interest of the New York creditors and shareholders in the fund is in the nature of the interest of cestuis que trustent in a trust fund, created: 1. To pay those of them who are creditors simply their claims in full or proportionately; 2. To pay from the balance, if any, those who are shareholders their claims in full or proportionately; and 3. To pay the ultimate balance, if any, to the assignee. The fact that the transaction creating the rights of the creditors and shareholders was in the form of a trust instead of a pledge does not make the rule above

mentioned any the less applicable to it. The object was security, and the difference is one of words rather than substance. In either case the creditors and shareholders have the right to have the fund set apart by the defendants for their benefit appropriated accordingly. The insolvency proceeding creates the necessity for a settlement of the trust, the same as for the settlement of pledges. The event upon the happening of which the trust was to be executed has arrived—namely, inability of the defendants to pay their obligations in full. Under these circumstances, the statutes of this state require the New York creditors, in common with all other secured creditors, domestic and foreign, to apply the value of their securities to their claims, and prove for the balance. They have the right to prove the claims here, but they must prove them as they are—that is, as secured claims: *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472, and note; *Loomis v. Farnum*, 14 N. H. 119. When creditors offer their claims for proof, the law of this state says to all alike, make the proper allowance for your securities, and the balance will be allowed. If difficulties may arise in some cases in determining the value of securities, there is none in this case. The securities have been converted into cash, and the cash is in the custody of the New York receiver. Creditors have presented claims there amounting to nearly one hundred and seventeen thousand dollars; there is about sixty-nine thousand dollars in the possession of the New York receiver, which must be applied toward the payment of the claims there, since the receiver, under the direction of the ⁵⁶² court, declines to send the money to the assignee. This money is applicable in the first instance to the payment of debts. So applying it, there will be a balance of some forty-eight thousand dollars of the New York debts unpaid; and for the payment of this balance the special fund is security. This fund is sufficient to pay the balance and leave about fifty-two thousand dollars for payment of shareholders' claims—leaving a balance of about one hundred and forty-eight thousand dollars, or seventy-four per cent, of those claims unprovided for if the claims are provable at their par value. These figures are used merely by way of illustration. The facts are not definitely stated in the case, and must be determined at the trial term. The point is that the balances of the shareholders' claims, whatever they may be, are provable in this proceeding, and upon them the owners are entitled to share in the distribution of the funds under the control of this

court, in common with all other shareholders, domestic and foreign.

2. There is a special fund in New Jersey, but the facts in relation to it are not reported. If what has been said regarding the New York fund does not dispose of the questions pertaining to the New Jersey fund, the latter must be considered upon a new case.

3. Another question reserved relates to the rights of unsecured shareholders who reside, or have proved claims, in states where there are ancillary receivers who have not transferred the money in their possession to the assignee for distribution.

The statute provides that the remainder of the proceeds of the property, after the payment of the expenses of the assignment and the "debts, claims, and obligations owing by the institution," shall be "divided among the stockholders according to their interests": Pub. Stats., c. 162, sec. 20. The principle that "equity is equality" is here recognized. The division contemplated is one made "upon principles of perfect equality": *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. Rep. 165. The statute makes no distinction on account of the residence of shareholders; it regards all alike wherever they reside. Their interests are represented by the amounts of their claims as allowed in the proceeding. Each shareholder, whether domestic or foreign, is entitled to receive the same percentage upon his claim as every other shareholder receives. Such a division could be more conveniently made if all ancillary receivers would transfer their funds to the assignee. It would be a simple problem to determine what percentage the single fund thus formed would be of the amount of all the claims, and to distribute the fund accordingly. In view of the certainty of such division and the convenience of this method of making it, it seems probable that all ancillary receivers, acting under the direction of the courts appointing them, will forward their funds to the assignee. The case is eminently one that ⁵⁶³ requires the co-operation of all courts which have jurisdiction of any of the funds, in order to attain the object desired by all with the least delay and expense, and the least liability to error. If, however, the funds in any state are withheld for any reason from the assignee, the court here will be obliged to undertake the difficult task of securing indirectly equality in the distribution: *Goodall v. Marshall*, 11 N. H. 88, 101, 35 Am. Dec. 472, and note. In that case it will be necessary to ascertain what shareholders receive or are entitled to receive

Dividends in the other states, and the amount of such dividends. If the receiver in any state retains the funds in his possession, and they are sufficient in amount to pay the shareholders who have proved their claims in the estate, a larger percentage than shareholders generally will be entitled to under the distribution to be made here, such foreign shareholders will not be entitled to any portion of the funds here. For example, if the percentage to which shareholders generally will be entitled proves to be thirty, and certain shareholders will receive thirty-five per cent from one or more ancillary receivers, they will be entitled to nothing in this proceeding; if they receive only twenty-five per cent, they will be entitled to receive here an additional five per cent. The remarks of the court in a recent English case upon a kindred question are pertinent in this connection. The court said: "No doubt, in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the court would be astute to equalize the payments and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. But subject to that, which is for the purpose of doing what is equal and just to all the creditors, I know of no law under which the English creditors are to be preferred to foreigners": *In re Kloebe*, 28 Ch. D. 175, 177. See, also, *Blake v. McClung*, 172 U. S. 239, 257, 19 Sup. Ct. Rep. 165.

Case discharged.

Parsons and Peaslee, JJ., did not sit; the others concurred.

The Effect of Insolvency Proceedings on Nonresident Creditors is considered in the monographic note to *Murray v. Roberts*, 15 Am. St. Rep. 212-221. A discharge in insolvency by a court of one state is of no effect against a creditor in another state who has not submitted himself to the jurisdiction of the court: *Chase v. Henry*, 168 Mass. 577, 55 Am. St. Rep. 423, 44 N. E. 988. But if he comes in and proves his claim, and takes a dividend on it, or if he accepts a sum offered under composition proceedings, he is held to have waived his right of objection: *Pattee v. Paige*, 163 Mass. 352, 47 Am. St. Rep. 459, 40 N. E. 108.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK

SHAYNE v. EVENING POST PUBLISHING COMPANY.

[168 N. Y. 70, 61 N. E. 115.]

NOTWITHSTANDING THE DISSOLUTION OF A CORPORATION, an action may be maintained upon a cause of action against it, whether founded on a wrong or otherwise. The common-law rule to the contrary, if adopted by the New York constitution of 1777, has since become obsolete. (p. 657.)

RULES OF LAW, WHEN CHANGED.—When the nature of things changes, the rules of law must change too. (p. 658.)

THE RULE THAT A PERSONAL ACTION DIES WITH THE PERSON does not extend to the civil death either of persons or corporations. (p. 659.)

CAUSE OF ACTION, SURVIVORSHIP OF.—A cause of action for libel against a corporation survives its dissolution, and may, therefore, be prosecuted against its trustees. (p. 660.)

Appeal by permission from an order of the appellate division of the supreme court, reversing an order of the special term, granting a motion to revive and continue, against the trustees of a dissolved corporation, an action for libel. The following was the question certified: "The defendant having been dissolved by the expiration of the term limited in its certificate of incorporation, and this action being for libel, and the action having for these reasons abated, has the court power to revive or continue the same against the trustees of the dissolved corporation, in office at the time of such dissolution?"

Edward J. Gavegan, for the appellant.

Lawrence Godkin, for the respondent.

⁷³ PARKER, C. J. Plaintiff brought this action to recover damages for alleged libels published in the defendant's newspaper in February, 1899, and when the action came on for trial on the fifteenth day of May, 1900, the defendant's attorney brought to the attention of the court the fact that the corporate existence of the defendant had terminated on the next preceding first day of January. As the action had abated, the plaintiff thereafter moved the court at special term for an order continuing and reviving it against the former directors of the defunct corporation and the motion was granted. The supreme court in its appellate division, however, reached the conclusion that the death of the corporation operated to destroy the cause of action, and so it reversed the order. There was a difference of view in the court, but the majority apparently felt constrained to follow the occasional dicta of judges that in actions of slander, libel, assault, and battery, or false imprisonment, the property of the shareholders of the corporation is no more subject to pursuit after the dissolution of the corporation than is the property of an individual after his death. The statute providing for the maintenance of actions against executors or administrators of a wrongdoer expressly excepts causes of the character last above named from the operation of the statute: 2 Rev. Stats. 447. This statute modified the rule of the common law so as to permit actions to be brought against executors or administrators for wrongs done to property rights or interests of persons; but it does not affect one way or the other causes of action against corporations. Nor is there any statute in this state indicating a legislative policy to prevent the maintenance of actions against a corporation or its trustees after dissolution, whether the cause of action be founded on a wrong or otherwise. Nor are we foreclosed by authority in this court from considering the question on its merits, for neither the diligence of counsel nor patient investigation on our part has brought to light any decision of this court bearing directly upon the question.

For this court to lay down a rule which would cut off causes ⁷⁴ of action for wrongs against a corporation upon its dissolution would seem to be both arbitrary and unjust, and, in some cases, it could be taken advantage of by the officers of the corporation, by permitting the charter to expire, and afterward reorganizing, instead of renewing the charter before its expiration. In this case there is no question of the good faith of the defendant. Its charter was allowed to expire by an over-

sight, and for a little time it proceeded as if its charter were in full force and effect. But if it be true, as the defendant contends, that the termination of the charter operated of itself to put an end absolutely to all causes of action for wrongs, then it matters not whether the termination be due to oversight or design, for it is the civil death of the corporation, and not the cause of its death, that destroys causes of action for wrongs. It hardly need be suggested that if such were the established rule there would be found plenty of persons interested in corporations who would plan to so take advantage of it as that meritorious causes of action might be destroyed, with only the temporary embarrassment and expense incident to the organization of a new corporation. Of still further importance, however, is the fact that such a rule would work unjustly in every case to a plaintiff in an action for libel such as this one, assuming, as we should, that the plaintiff has a meritorious cause of action.

If a recovery be had during the lifetime of the corporation, the moneys required to satisfy the judgment are necessarily taken from assets belonging to the stockholders and reduce the value of their holdings in the amount required to pay the judgment. If a judgment be recovered after the termination of the existence of the corporation, the result is the same; for the avails of all the assets of the corporation after payment of all just debts and claims owing by it must be distributed among the stockholders if the corporation be wound up, or if another course be taken and a reorganization be had, the assets of the new corporation are reduced in value in the amount required to pay the judgment. So far as the stockholders, who are the owners of all of the assets of the corporation, are ⁷⁵ concerned, therefore, it matters not whether the judgment be taken before dissolution or afterward, for in any event it is the assets of the corporation which are used in satisfying the demand. In the one case the action is prosecuted to judgment against the corporation, and in the other against the directors, who by force of the statute have become the trustees of the assets of the corporation for the benefit of the stockholders. But this is a difference of form, not of substance, for both the corporation and the trustees represent the assets out of which the judgment must be satisfied, and in which the stockholders are alone interested after the satisfaction of all just debts and demands. It is apparent, therefore, that the stockholders have no just ground upon which to predicate a claim that the party who has been wronged by the corporation shall be deprived of his cause of ac-

tion in the event of the dissolution of the corporation. On the other hand, the plaintiff needs his damages, and in some cases the vindication which an award of damages brings, none the less because, designedly, or carelessly, the charter of the corporation is permitted to expire.

If we are right in the view thus expressed as to the merits of the controversy, there can be no doubt what would be the decision of the court were the question one which had never before been up for consideration in the courts of this country or England. It is urged, however, that notwithstanding that the merits appeal strongly in the plaintiff's behalf, and that there is an utter absence of decisions in this state, standing in the way of a just determination, we are prevented from making that determination by a rule of the common law of England which concededly would have cut off such a claim as plaintiff's. Inasmuch as the constitution of 1777 provided that "such parts of the common law and of the acts of the legislature of the colony of New York as together already form the law of the said colony . . . shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same," it is contended that the common law is now in force except so far as it may ⁷⁶ have been expressly altered by acts of the legislature of this state. This court has interpreted this provision of the constitution to mean not that all the common law of England was the law of the colony at the time of the making of the constitution, but only so much of it as was applicable to the circumstances of the colonists and conformable to our institutions: *Cutting v. Cutting*, 86 N. Y. 522, 529; *Williams v. Williams*, 8 N. Y. 525, 541.

It is at least doubtful, as will be apparent when we come to consider briefly the history of the rule, whether it did become a part of the law of this state; but we prefer to rest our decision on the ground that if such a rule were applicable to this state at the time of the adoption of the constitution, the effect of subsequent legislation regarding corporations, created by and under the laws of this state has been such as to render it wholly inapplicable. This rule had its origin when corporations were either municipal, ecclesiastical, or eleemosynary, and business corporations were unknown. There were no stockholders or natural persons, who were entitled to the assets of the deceased corporation, and, as in the case of an individual dying without heirs, the personalty went to the king, while to prevent the realty from escheating to the king it was held that it reverted

to the donor, upon the ground that the grant being made to the corporation for public or charitable uses, it was made only for its life. Against those corporations all causes of action, whether upon contract or for tort, were extinguished, and so, too, were all causes of action which the corporation had against individuals: 2 Kyd on Corporations, published 1793, p. 516; Angell & Ames on Corporations, secs. 779, 779a; Grant on Corporations, 804.

Angell & Ames, in section 779a, say: "The rule of the common law in relation to the effect of dissolution upon the property and debts of a corporation has, in fact, become obsolete and odious. Practically, it has never been applied in England to insolvent or dissolved moneyed corporations. . . . Indeed, at this day, it may well be doubted whether in the view, at least, of a court of equity it has any application to other than public and eleemosynary corporations, with which it had its origin." It will be observed that the learned authors do not suggest that it was never applied by the courts to other than public and eleemosynary corporations, but that it is no longer applied.

In this state the rule has never been applied to business corporations, and as early as 1811 an act was passed constituting the directors of such corporations, in the event of voluntary dissolution, trustees to settle its affairs, and divide the money among the stockholders after paying the debts due and owing by the corporation at the time of its dissolution. This statute, without substantial change, is now to be found in section 30 of the General Corporation Law, and when it is considered in connection with the other provisions of the statute relating to business corporations, we find that the ancient rule that the liabilities of the corporations as well as the debts owing to them are extinguished by the dissolution of the corporations, the personality vesting in the king, and the real estate in the donor, has been entirely ignored by the law-making power in this state, which has instead provided a more equitable method for the distribution of the assets, which secures to the stockholders what is left after those are satisfied who have valid claims against the corporation. So, if it be technically true that the rule once prevailed in this state, because of the language of the constitution of 1777—which I doubt—it is no longer in force because of the changed conditions surrounding the creation and dissolution of corporations and the distribution of the assets after dissolution. Ram, in his work on Legal Judgments, page

73, states the rule, as it has often been applied by the courts, and as we find it our duty to apply it in this case, in these words: "When a rule relates to the nature of things, as such nature existed at a former period, and the reason of the rule corresponds with that nature, then at an after time, if the nature of the things is altered, and, by this alteration, the rule is become too general, and the reason given for it fails, the rule in a case of this ⁷⁸ kind is no longer binding. In *Davies v. Powell, Willes*, 46, Willes, C. J., giving the opinion of the court, says: 'When the nature of things changes, the rules of law must change too.'"

Nor do we think the rule, "*Actio personalis moritur cum persona*," should be applied. It has long been in force, both in England and this country, and in this state has received legislative approval in so far as causes of action for libel, slander, and assault and battery are concerned, but our decisions have not extended the rule to the civil death of either persons or corporations. Nor has the language of our statute, which authorizes the continuance of certain actions for moneys against the executors and administrators of wrongdoers, but excepts actions for libel, slander, assault, and battery, and false imprisonment, been held to include the civil death of either individuals or corporations, and it is sufficient for our present purpose to say that such an intent on the part of the legislature cannot be spelled out of the language employed by it. It is said that the rule of the common law, which has not been interfered with by statute, so far as actions for libel are concerned, may, by a process of analogical reasoning, be so extended as to include artificial "persons," and death resulting from an act of God to embrace death of a corporation by execution or other operation of law, and, further, that such reasoning has led learned judges to assume it to be the law that the dissolution of a corporation relieves its assets from that which would otherwise constitute a legal burden—that of responding for the damages occasioned to others through the misconduct of its representatives or agents. If it be true that, reasoning by analogy, but a single advance step need be taken in order to support the defendant's position, that step should not be taken, however short it may be, inasmuch as the result reached would be without support in the elements of justice, as we have already attempted to show. It is not a short step, however, for the reason of the rule preventing suit against an executor for the wrongs of his testator is stated to be that as neither the executors of the plaintiff nor

those of the defendant have committed in their own personal capacity any manner ⁷⁹ of wrong or injury, they should not be prosecuted for torts in actions which were originally designed for the punishment of the wrongdoer. On the other hand, the object of actions *ex contractu* being to reach "the property rather than the person, in which the executors now have the same interest that their testator had before," it was decided that they should be revived and continued against the executor: 1 Woerner's American Law of Administration, secs. 290-292, and notes; *Phillips v. Homfray*, L. R. 24 Ch. D. 457; *Finlay v. Chirney*, L. R. 20 Q. B. D. 502-504.

The remedy of a plaintiff, in an action for libel to recover damages, is against the property of the corporation solely. Whether his judgment be rendered against the corporation or against the trustees after dissolution, he can have satisfaction only out of the assets of the corporation. The object of his action, therefore, is to reach the property of the corporation, and, hence, it is in all respects within the very reason assigned in support of the right of a creditor to bring actions *ex contractu* against the executor.

Our conclusion is that as the plaintiff could have had satisfaction of his claim—if he have one—out of the assets of the defendant corporation, had he prosecuted his action to judgment before the termination of the latter's corporate life, so should he now have satisfaction, as he has taken no step which either forfeits or affects his right, unless some rule of law stands across the pathway leading to justice for him, and after a careful examination of the subject we have been unable to find any such rule of law in this state.

The question certified to this court by the appellate division should be answered in the affirmative, its order reversed, and that of the special term affirmed, with costs.

Bartlett, Haight, Vann, Landon, Cullen, and Werner, JJ., concur.

Abatement of Action by Dissolution of Corporation.—At the common law a corporation, after its dissolution, could not sue or be sued, and all pending suits by or against it were abated. This doctrine has been recognized in some of the American states, but repudiated in others: See the note to *May v. State Bank*, 40 Am. Dec. 738-740. It has been held that the plea that a corporation has ceased to exist in law is insufficient, but that the plea must further aver that it had ceased to exist in fact at the time when the cause of action arose: *Miller v. Newburg etc. Coal Co.*, 81 W. Va. 836, 13 Am. St. Rep. 903, 8 S. E. 600. A suit pending against a railway company

when its franchises and property are sold may be continued against its directors or managers: *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647. But it has been held that a judgment rendered against a corporation after its dissolution, or after a surrender by it and an acceptance by the state of its corporate rights and franchises, is void: *Combs v. Keyes*, 89 Wis. 297, 46 Am. St. Rep. 839, 62 N. W. 89; *Merrill v. Suffolk Bank*, 81 Me. 57, 50 Am. Dec. 649. Compare *Hunt v. Columbian Ins. Co.*, 55 Me. 290, 92 Am. Dec. 292.

MATTER OF CHAPMAN v. NEW YORK.

[168 N. Y. 80, 61 N. E. 108.]

CONSTITUTIONAL LAW.—A STATUTE IMPOSING A LIABILITY UPON A CITY for the reasonable expenses or counsel fees paid or incurred by any of its officers in successfully defending against a proceeding to remove him from office, or to convict him of a crime, violates that provision of the constitution declaring that no county, city, town, or village shall give any moneys or lend its name or credit in aid of any individual or corporation, nor be allowed to incur any indebtedness except for a county, city, town, or village purpose. (pp. 661, 665.)

A MUNICIPAL CORPORATION IS NOT UNDER ANY MORAL OBLIGATION to pay the expenses incurred by any of its officers in successfully resisting a proceeding to remove him from office, and hence the legislature cannot impose on it a liability to pay such expenses after they have been incurred. (p. 663.)

MUNICIPAL CORPORATIONS—CITY OR COUNTY PURPOSE, WHAT IS NOT.—The expenses incurred by a municipal officer in the successful resistance of a proceeding to remove him from office cannot be chargeable against the city on the ground that they were incurred for a city purpose. (p. 665.)

William F. S. Hart, for the appellant.

John Whalen, corporation counsel, and Theodore Connoly, for the respondent.

§§ VANN, J. The statute under which this proceeding was instituted provides for the appointment of a referee "to hear, examine into, and report" the amount of reasonable counsel fees and expenses paid or incurred by a city or county officer in successfully defending himself in any trial or proceeding "to remove him from office, or . . . to convict him of any crime" alleged to have been committed "in the performance of, or in connection with, his official duties," and that the amount allowed by the referee, when confirmed by the court, be paid by the issue of revenue bonds to be included in the taxes levied

for the following year in the city or county affected: Laws 1899, c. 700. Another part of the act provides for the payment of similar claims by the state; but, as the validity of that part is not involved in this appeal, no further allusion need be made to it.

While other questions have been discussed before us, the main question is whether the legislature had power, under the constitution of our state, to pass this statute. That question has been passed upon several times by the supreme court, and the conclusion reached by every judge who considered it is that the statute is unconstitutional: *Matter of Straus*, 44 App. Div. 425, 61 N. Y. Supp. 37; *Matter of Jensen*, 28 Misc. Rep. 379, 59 N. Y. Supp. 653; affirmed, 44 App. Div. 509, 60 N. Y. Supp. 933; *Matter of Chapman*, 57 App. Div. 582, 68 N. Y. Supp. 1135; *Matter of Fallon*, 28 Misc. Rep. 748, 59 N. Y. Supp. 849; *Matter of Labrake*, 29 Misc. Rep. 87, 60 N. Y. Supp. 989. Our examination has led us to the same result, and, as the discussion of the subject has been so thorough and able in the courts below, it is necessary for us to do little more than announce our conclusion.

In a case which arose under the constitution of 1846, before it was amended, expressions were used by learned judges of this court which went beyond the requirements of the decision they made: *Guilford v. Board of Supervisors of Chenango Co.*, 13 N. Y. 143. All that was actually decided was that the legislature had power to require a board of supervisors to assess upon the taxable property of a town the amount which highway commissioners had been compelled to pay for costs in an action commenced by them pursuant to the direction of the voters of the town. The payment of such a claim was not an act of charity, as it rested on a strong moral obligation. It was, however, declared in one of the opinions that "the legislature has the right to appropriate the public moneys for local or private purposes, and to impose a tax upon the property of the whole state, or any portion of the state, or any particular or specified kind of property." In another opinion it was said: "The legislature is not confined in its appropriation of the public moneys or of the sums to be raised by taxation in favor of individuals to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice in the largest sense of those terms or in gratitude or charity." Subsequent cases, following the dicta rather than the decision, led to results which, as it is said, induced the people, in 1874, to amend the

constitution by adding sections 10 and 11 to article 8. Section 11 was amended in 1884 by adding further provisions, and the substance of both sections appears in the revised constitution of 1894: Const., art. 8, secs. 9, 10. Section 9 is not now important, as it relates to the giving or lending of the credit or money of the state, but section 10 makes it a part of our fundamental law that "no county, city, town, or village shall hereafter give any money or property, or loan its money or credit to, or in aid of, any individual, association, or corporation, . . . , nor shall any such county, city, town, or village be allowed to incur any indebtedness, except for county, city, town, or village purposes." It has been held that this provision does not prevent the legislature from authorizing the payment by a municipal corporation of a claim which, although it could not be enforced by the courts is founded in justice, supported by a moral obligation, and could have been legally created if the proceedings of the ⁸⁵ local authorities had been regular: *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204-211, 23 N. E. 542. So it may be argued that payment of a claim otherwise valid, but against which the statute of limitations had run in favor of a municipal corporation, or of one for money expended or services performed for the benefit of a city without lawful authority, might be authorized or required by the legislature: *New Orleans v. Clark*, 95 U. S. 644; *Friend v. Gilbert*, 108 Mass. 408; *Brewster v. Syracuse*, 19 N. Y. 116; *Brown v. Mayor etc. of New York*, 63 N. Y. 239; *Mayor etc. of New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618. If a legal liability to pay once existed, but has been suspended or barred in some technical way short of substantial satisfaction, a moral obligation to pay still exists, which is recognized both by statute and common law: Code Civ. Proc., sec. 395; *Tebbetts v. Dowd*, 23 Wend. 379-382; *Buswell's Statute of Limitations*, sec. 36.

In the case before us, however, no benefit was conferred upon the city, and there was never a legal or moral obligation on the part of the city to pay the claim in question. For time out of mind, in all governments where the common law prevails, a person prosecuted for crime has been compelled to pay his own expenses when he had the means of doing so: *People v. Board of Supervisors*, 4 N. Y. Cr. Rep. 102; affirmed, 102 N. Y. 691. If without means, the counsel assigned by the court served without pay, except under a recent statute a moderate allowance may be made in a capital case: *Laws 1897, c. 427*; Code

Crim. Proc., sec. 308. This exception is founded on the theory that a fair trial cannot be had without the aid of counsel, and that money paid from public funds to counsel appointed by the court for a prisoner without means is paid for a public purpose. The proceeding instituted against the appellant was not a prosecution for crime, but to discipline or remove him for misconduct as a public officer. There was no authority, statutory or otherwise, to appoint counsel to defend him, and no attempt was made to do so. It was necessary for him to employ and pay his own counsel, as has always been the case with others ⁸⁶ similarly situated. Payment of his expenses by the public would be a mere gratuity, and without the sanction of custom or precedent. There was no moral obligation on the part of the respondent to discharge such a claim, for it had no foundation in natural or legal right. It is not the duty of the public to defend or aid in the defense of one charged with official misconduct. The history of morals or jurisprudence recognizes no such obligation. When a citizen accepts a public office he assumes the risk of defending himself against unfounded accusations at his own expense. Whoever lives in a country governed by law assumes the risk of having to defend himself without aid from the public, against even unjust attempts to enforce the law, the same as he assumes the burden of taxation. As was said in *Matter of Jensen*, 28 Misc. Rep. 879, 59 N. Y. Supp. 653, it is "a part of the price he pays for the protective influence of our institutions of government." Asking for aid to pay the expenses of a defense already made from one's own resources is like asking for aid in the payment of taxes or the discharge of any public burden. It is not a city or county purpose, but a mere gift.

The courts have found it difficult to define a county, city, town, or village purpose, and have, as a rule, proceeded by the process of exclusion: *People v. Kelly*, 76 N. Y. 475-487; *Matter of Mayor etc. of New York*, 99 N. Y. 569-585; *Matter of Niagara Falls etc. Ry. Co.*, 108 N. Y. 375-385, 15 N. E. 429.

In *Sun Printing etc. Assn. v. Mayor etc. of New York*, 152 N. Y. 257-265, 46 N. E. 499, the following general definition was laid down: "The purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character and authorized by the legislature."

In *Bush v. Board of Supervisors*, 159 N. Y. 212-217, 70 Am. St. Rep. 538, 53 N. E. 1121, it was declared, in substance, that

the payment of a claim "which there was no legal or moral obligation on the part of" a town to pay, is not a town purpose, and "is in conflict with the provision of the constitution which forbids the town from giving any money to or in aid of an individual."

⁸⁷ In *Matter of Greene*, 166 N. Y. 485-494, 60 N. E. 183, the court alluded to "the distinction between the gratuity which the constitution now forbids and the meritorious claim which it permits municipal bodies to satisfy." In *Board of Supervisors v. State*, 153 N. Y. 279-293, 47 N. E. 288, which involved the validity of an act providing for the reimbursement of a county by the state for the expenses of trials for crimes committed in a state prison, it was held that such provision "was not a gift of money by the state, but was intended as a discharge of an equitable obligation, although unenforceable, which, in the judgment of the legislature, rested upon the state."

In *Roberts v. State*, 160 N. Y. 217, 54 N. E. 678, no definition was attempted, but the doubt expressed on page 224 of 160 N. Y., and page 679 of 54 N. E., is not without significance.

As a city purpose is of necessity a public purpose, limited or applied to a city, the definition of a public purpose by the supreme court of the United States, in an important case, is worthy of careful attention. That learned court declared that "there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear, and the reason for interference cogent. And in deciding whether, in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people, may well be held to belong to a public use and proper for the maintenance of good government," ⁸⁸ though this may not be the only criterion of rightful taxation": *Citizens' etc. Loan Assn. v. To-*

peka, 20 Wall. 655-664. See, also, Dillon on Municipal Corporations, 4th ed., secs. 75, 76; Cooley's Constitutional Limitations, 5th ed., 283, 286; *People v. Coler*, 166 N. Y. 1-44, 82 Am. St. Rep. 605, 59 N. E. 716.

Tested by these definitions—and we find none more liberal—payment of the appellant's claim, which arose nearly three years before the statute in question was passed, is not a city or county purpose. His defense was for his own benefit, not for the benefit of the city. It was a private matter of his own, the same as if he had been sued by the city in an action at law, and had succeeded in his defense. As we have seen, there was no legal liability or moral obligation on the part of the city to pay his expenses, which were not necessary for the common good and general welfare of the municipality, nor public in character, nor, so far as appears, sanctioned by its citizens. It was in no sense a meritorious claim from the standpoint of public interest or good government, nor one the payment of which is sanctioned by the history of legislation or the acquiescence of the people. He made an unprecedented demand, and its novelty, when the numerous opportunities for the presentation of such claims for time out of mind are considered, is almost a demonstration that it was not incurred for a public purpose. While vast numbers of people, during the history of the state, have had claims similar in principle, seldom, if ever before, has one been bold enough to ask for legislation such as that under consideration.

While we are always reluctant to interfere with an act of the legislature, the command of the constitution is supreme, and we are compelled to obey it by adjudging that the statute in question, in so far as it authorizes the payment of the appellant's claim from the funds of the respondent, is unconstitutional and void: *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586.

The order appealed from should be affirmed, with costs.

Parker, C. J., Bartlett, Haight, Landon, Cullen, and Werner, JJ., concur.

Attorney's Fee.—The constitutionality of statutes allowing attorneys' fees is considered in the monographic note to *Dell v. Marvin*, 79 Am. St. Rep. 178-186.

Expense of Officers.—A municipal corporation may indemnify an officer acting in good faith for a loss incurred in the discharge of his official duty, but the duty must have been one authorized or imposed by law, or the matter one in which the corporation had an interest: *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. Rep. 485; *James v. Seattle*, 22 Wash. 654, 79 Am. St. Rep. 957, 62 Pac. 84.

BOSWORTH v. ALLEN.

[168 N. Y. 157, 61 N. E. 163.]

CORPORATIONS—LIABILITY OF DIRECTORS TO ACCOUNT FOR THE CONSEQUENCES OF THEIR WRONGS.—The directors of a corporation are charged with the duties of trustees, are bound to care for its property and manage its affairs in good faith, and, for a violation of these duties resulting in waste of its assets, injury to the property, or unlawful gain to themselves, they are liable to account in equity the same as other trustees. (pp. 669, 670.)

CORPORATIONS—DIRECTORS' LIABILITY TO ACCOUNT.—FOR THE PROCEEDS OF THEIR CONSPIRACY to dispose of their shares, to resign from their office, and to turn the corporation and its property over to irresponsible persons, the directors are liable to account both for the amount by them received in excess of the value of their stock and for the losses resulting to the corporation from the wrongful acts of their successors. (p. 671.)

CORPORATION—DIRECTORS—JOINDER OF CAUSES OF ACTION AGAINST.—In a suit against former directors of a corporation who, in pursuance of a conspiracy, dispose of their shares, resign their office, and turn over the corporation and its property to irresponsible directors who are elected in their stead, recovery may be had in a single action for all the consequences of such conspiracy, including the moneys received by such directors, losses in the management of their successors, and the setting aside of contracts made by them. The cause of action is the wrongful conspiracy, however numerous may be its results. (p. 671.)

Action by Bosworth as receiver of the Genesee National Savings and Loan Association against Allen and others who, in 1898, were directors of the plaintiff corporation. At that time the directors entered into a conspiracy with John L. White and John W. Reynolds, known to be irresponsible and untrustworthy, to elect them and other persons directors, and to turn over the business and property of the corporation to them. The conspiracy was carried out by the transfer of the defendants' stock, their resignation as directors, and the election of others in their stead, who assumed control of the corporation and its property. The defendants, upon the transfer of their stock, were paid a sum exceeding its withdrawal value by eleven hundred and sixty-eight dollars and fifty-three cents. It was also part of the conspiracy that the defendant, Allen, should be employed as attorney for the corporation for two years, at a compensation of two hundred dollars a month, and that the defendants should be paid by Reynolds, White, and others a bonus of about eighteen

thousand dollars. Both the sums mentioned were paid, the business of the corporation was subsequently grossly mismanaged, its assets wasted by the payment of unnecessary expenses and extravagant salaries in the sum of twelve thousand dollars and upward, various wasteful and improvident contracts were entered into, which the corporation was compelled to expend about five thousand dollars in annulling and in obtaining possession of its property, and ousting White, Reynolds, and their associates from their positions as officers and directors. The corporation was also deprived of rents and profits on real estate and interest on money amounting to thirteen thousand dollars. The prayer of the complaint was for the annulment of the contract with Allen, also that the amount of money paid to the defendants be ascertained, that they be required to account for it, that the amount of damages sustained by the corporation by the wrongful acts of the defendant be fixed and judgment given therefor, and, further, that plaintiffs have general relief. The defendant, Allen, demurred on the ground that there was misjoinder or improper union of causes of action, to wit, that a cause of action to recover eighteen thousand dollars received to the use of plaintiff was united with a cause of action in tort to set aside the contract with Allen, and with a cause of action to recover moneys wrongfully paid to the defendants above the value of their stock, and with a cause of action to recover damages for a conspiracy entered into between the defendant and White and others. Other defendants demurred on substantially the same grounds. The special term decided that several causes of action were improperly united, and directed an interlocutory judgment to be thereupon entered in favor of the defendants. This judgment was affirmed by the appellate division upon appeal, two of the justices dissenting. Thereupon the following questions were certified for decision: "1. Whether the complaint herein states more than one cause of action; 2. Whether, if the complaint states two or more causes of action, they belong to the same class, either tort or contract, and may be joined; 3. Whether or not, if the complaint states two or more causes of action, they arose out of the same transaction and are consistent with each other."

David N. Salisbury, for the appellant.

Richard E. White, Reed & Shutt, and C. M. Allen, for the respondents.

164 VANN, J. The defendants conspired to wreck the corporation of which they were directors, and to thereby make money for themselves. Although they sustained a relation of trust to the corporation, and were bound to promote its interests and protect its property, they entered into a combination to destroy it in order to enrich themselves. While not technically trustees, for the title of the corporate property was in the corporation itself, they were charged with the duties and subject to the liabilities of trustees. Clothed with the power of controlling the property and managing the affairs of the corporation, without let or hindrance, as to third persons they were its agents, but as to the corporation itself, equity holds them liable as trustees: 2 Pomeroy's Equity Jurisprudence, secs. 1061, 1063, **165** 1088, 1097; 2 Beach's Equity Jurisprudence, sec. 845; Potter on Corporations, sec. 330; Thompson's Liability of Officers and Agents of Corporations, 351, 360, 375; Aberdeen Ry. Co. v. Blakie, 1 Macq. 461; Taylor v. Chichester etc. Ry. Co., L. R. 2 Ex. 379; Ervin v. Oregon Ry. etc. Co., 27 Fed. 625, 630; Duncomb v. New York etc. R. R. Co., 84 N. Y. 190, 198; Marvin v. Brooks, 94 N. Y. 71; Hiscock v. Lacy, 9 Misc. Rep. 578, 592, 30 N. Y. Supp. 860.

While courts of law generally treat the directors as agents, courts of equity treat them as trustees, and hold them to a strict account of any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct: Brinckerhoff v. Bostwick, 88 N. Y. 52, 58; Robinson v. Smith, 3 Paige, 222, 24 Am. Dec. 212; Verplank v. Mercantile Ins. Co., 1 Edw. Ch. 46; Charitable Corp. v. Sutton, 2 Atk. 400; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624. The corporation itself had the right to call the directors to account, and such was originally the form of the action before us, but since the trial a receiver has been appointed and substituted as plaintiff herein.

While detached portions of the complaint, when read by themselves, would support several causes of action, when all the allegations are considered together we find but two—one on action against trustees, or those liable as trustees, for an accounting, and another, incidental thereto and consistent therewith, arising out of the same transaction and belonging to the same class, to wit, an action to set aside a written contract entered into through the defendants as trustees pursuant to the same fraudulent conspiracy upon which the main cause of action is founded. Both rest upon the same equitable principle, although one de-

pende upon a single overt act and the other upon many, committed in carrying the conspiracy into effect. That principle is that the directors of a corporation are charged with the duties of trustees, and bound to care for its property and manage its affairs in good faith, and for a violation of that duty, resulting in waste of its assets, injury to its property, or unlawful gain to themselves, they are liable to ¹⁶⁶ account in equity the same as ordinary trustees. The corporation has the right to call upon them to account, not only for all the property intrusted to their care, but also for all moneys furtively made by them at its expense. It is the peculiar province of courts of equity to supervise the execution of trusts and to call trustees to an accounting for their management of trust estates, and especially for every violation of their primary duty not to deal with trust property for their own advantage: *Hiscock v. Lacy*, 9 Misc. Rep. 578, 592, 30 N. Y. Supp. 860; *Husted v. Thomson*, 158 N. Y. 328, 335, 53 N. E. 20. Equitable jurisdiction extends to all culpable acts and omissions of the directors, by which the pecuniary interests of the corporation are, or may be, injured. If they are treacherous to its interests and appropriate its property, or intentionally waste its assets, or take money for official action, or "sell out," by resigning and thus giving control to others, they are liable to account in equity to the corporation or its representatives, not only for the money or property in their hands, but also for such as they fraudulently disposed of or wasted, as well as for the damages naturally resulting from their official misconduct, and even, as we have recently held, for money received by virtue of their office: *McClure v. Law*, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 388. A court of equity has power, at the instance of the proper party, through its flexible and comprehensive action for an accounting, to inquire into every official act of the officers and directors, and, testing them by the standard of good faith and the absence of gross negligence, to compel restitution of property withheld, with compensation for assets wasted, and to award damages for the natural consequences of official misconduct, when such damages are claimed, in connection with equitable relief, on account of a general course of injurious action or a conspiracy to despoil the corporation. Even if part of the relief could be had in actions at law, still, when it is sought in connection with strictly equitable relief, such as the discovery of trust property and the recovery thereof, and the right to all relief springs from a com-

mon cause, such as a conspiracy, all may be included in the sweeping action for an accounting.

¹⁶⁷ The sum of eleven hundred and sixty-eight dollars and fifty-three cents, specifically alleged to have been paid to the defendants in excess of the withdrawal value of their shares, belonged to the corporation, and they are liable to account for it as money wrongfully paid to them pursuant to the conspiracy. The amount, not specifically alleged, paid to them for official action, was money obtained pursuant to the same conspiracy by virtue of their office as directors, for which they must account as part of the assets of the corporation. This money they could not lawfully receive for themselves. They received it as the price of the transfer of all the corporate assets to the custody of irresponsible third parties, and the law, in order to protect the corporation, treats it as its property, and, therefore, money which it is entitled to recover from all the defendants. Their conspiracy was to keep it themselves, and the receipt thereof was an overt act in execution of the conspiracy. The loss of money by the corporation subsequent to the conspiracy, and in consequence thereof, through the wrongful acts of the defendants' successors placed in office by their treachery, was the natural and, therefore, the expected, result of the conspiracy itself.

The value of the assets wasted and the amount of expense incurred as the direct and natural result of the conspiracy must be accounted for by the defendants, because those assets were intrusted to their care and protection as trustees, and having broken their trust they are liable for all the proximate consequences. Through an action for an accounting a court of equity has power to discover and fix the value of all assets improperly withheld pursuant to the conspiracy, and of all property lost and damages caused by the wrongful acts of the defendants, and to compel them jointly and severally to pay the aggregate amount over to the plaintiff. Through the conspiracy and the overt acts in execution thereof, the defendants violated their duty as trustees, and equity will award complete relief in a single action for all the consequences of such violation, even if a part thereof might be had in action at law. While the cestui que trust may sometimes proceed at law against his trustee, he need not do so, but may always call him ¹⁶⁸ into a court of equity. That course was pursued in this case, and the entire complaint, although verbose and inartificial in form, is

simply an action to compel trustees to account, except so far as it seeks to set aside a written contract, entered into between one of the defendants and the corporation in partial execution of the conspiracy, whereby assets were to be wrongfully diverted to him. All the defendants are responsible for that contract, for it was part of the fraudulent confederation into which they all entered. It was part of the wrong intended and accomplished by them. The cause of action to set it aside was properly united with the cause of action to compel the defendants to account for the injurious results of the arrangement of which it was a part. Both causes of action were founded upon claims against trustees arising by operation of law: Code Civ. Proc., sec. 484, par. 8. The fundamental fact upon which the right to all relief rested was the conspiracy entered into by the trustees against the corporation to do or aid in doing all the acts complained of. All the injuries charged result from the overt acts of the defendants pursuant to, and in execution of, the conspiracy. As all stand on that common ground, all were affected by each cause of action, although not equally. All were proper parties and the cancellation of the contract was relief appropriate and incidental to the main object of the action, which was to compel trustees to account for official misconduct and make restitution of property withheld, with compensation for property wasted and expenses necessarily incurred to prevent further injury. In a single equitable action the court may go to the bottom of the wrong, and work out, in such form as the facts require, all the relief called for by the conspiracy of the defendants against the corporation toward which they stood as trustees.

The order appealed from should be reversed, the demurrers overruled, with costs in all courts, and the questions certified answered in the affirmative.

Parker, C. J., Bartlett, Haight, Landon, Cullen, and Werner, JJ., concur.

The Directors of a Corporation must be diligent and careful in performing the duties they have undertaken: *Marshall v. Farmers' etc. Bank*, 85 Va. 676, 17 Am. St. Rep. 84, 8 S. E. 586. They must exercise ordinary care, skill, and diligence, and give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances: *Warren v. Robison*, 19 Utah, 289, 75 Am. St. Rep. 734, 57 Pac. 287; *North Hudson etc. Assn. v. Childs*, 82 Wis. 460, 83 Am. St. Rep. 57, 52 N. W. 600. They are required to act in the utmost good faith: *Ten Eyck v. Pontiac etc. R. R. Co.*, 74 Mich. 226, 16 Am. St. Rep.

633, 41 N. W. 905. See, further, the monographic notes to *Marshall v. Farmers' etc. Bank*, 17 Am. St. Rep. 97-100; *Hodges v. New England Screw Co.*, 53 Am. Dec. 637-651.

A Director Must Account to the Corporation for money acquired by virtue of his official acts: *McClure v. Law*, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 888.

ROBERT v. POWELL.

[168 N. Y. 411, 61 N. E. 699.]

NUISANCE IN A PUBLIC STREET—WHAT IS NOT.—A stepping-stone or carriage-block eighteen inches high, thirteen inches long, and sixteen inches wide, standing nine or ten inches from the edge of the curb of a sidewalk, in front of a residence, is not a public nuisance, and one injured by stumbling over it cannot maintain an action to recover damages therefor. (p. 674.)

MUNICIPAL CORPORATIONS—PUBLIC STREETS.—A STEPPING-STONE LOCATED UPON A SIDEWALK in front of a private house is a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desire to visit or enter the house for business or other lawful purposes. (p. 675.)

Abram I. Elkus and Frank Lawrence, for the appellant.

Henry A. Powell, for the respondent.

413 O'BRIEN, J. The plaintiff in this action sought to recover damages for a personal injury sustained, as he alleged, from an unlawful obstruction maintained by the defendant in a public street of the city of New York. There is no dispute about the facts in the case. On the night of the 20th of February, 1897, the plaintiff, while walking rapidly on Fifty-eighth street, crossed the street diagonally from the defendant's house, in order to take a cab, and stumbled over a stepping-stone or carriage-block maintained by the defendant in front of the residence, No. 324 West Fifty-eighth street. The stone over which he fell was eighteen inches high, thirteen inches long, and sixteen inches wide. There was an open passageway between the stone and the house in front of which it stood of about eight feet of sidewalk. The front edge of the stone was back from the front edge of the curb about nine or ten inches, and the place where the accident occurred was so lighted at the time that the plaintiff could easily see the cab which he sought to take, and which was about two hundred and fifty feet away from him when

he saw it. The theory of the plaintiff is that this stepping-stone maintained upon the sidewalk in front of the defendant's house was a public nuisance, and that she is responsible to him in damages for the injury sustained.

On the trial of the action testimony was given on both sides in regard to the facts and circumstances, and there was no material conflict as to the nature of the alleged obstruction, or as to the manner in which the plaintiff received the injury. ⁴¹⁴ The defendant's counsel requested the court to dismiss the complaint, or to direct a verdict in favor of the defendant. The court decided to submit the case to the jury, reserving, however, the decision of the defendant's motion until after the case had been passed upon by the jury. The jury returned a verdict for the plaintiff for one thousand dollars, which the trial court subsequently, upon consideration of the whole case, set aside and dismissed the complaint, holding and deciding virtually that the undisputed facts and circumstances disclosed at the trial constituted no ground of liability on the part of the defendant. The action of the trial court was unanimously affirmed at the appellate division, and the question here is whether there was any evidence given at the trial which should have been submitted to the jury, or which disclosed any cause of action against the defendant.

We think the decision below was clearly right. No other result could be upheld, unless we are prepared to say that every object of this character which is placed in a public street constitutes a nuisance, or that a jury would be justified in finding it to be such. It is quite true, as the learned counsel for the plaintiff contends, that every unlawful obstruction placed in a public street which endangers the safety of travelers may be regarded as a nuisance, but the question is, What object will constitute an unlawful or dangerous obstruction? There are some objects which may be placed in, or exist in, a public street, such as water hydrants, hitching-posts, telegraph poles, awning-posts, or stepping-stones, such as the one described in this case, which cannot be held to constitute a nuisance. They are, in some respects, incidental to the proper use of the street as a public highway. The hitching-post, for instance, in front of a private residence, is intended not only for the convenience of the private individual, but for the safety of the public as well, since it is intended to guard against accidents resulting from runaway teams or horses. It is quite conceivable that a shade tree located within the boundaries of the street or highway may cause

an accident or injury to a private individual using the street. But it does not follow that it ⁴¹⁵ constitutes a public nuisance in the highway. The stepping-stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purpose. It did not interfere in the least with the use of the roadway or bed of the street; nor did it interfere to any appreciable or unreasonable extent with the use of the sidewalk. There were eight feet of a clear, open space upon the sidewalk for the use of travelers, and the fact that the plaintiff, while hurrying in the night-time to take a cab, stumbled over the stone, when the place was well lighted, and the object plainly visible, does not prove, or tend to prove, that the defendant was guilty of any wrong or breach of duty in maintaining the stepping-stone in front of her house. It is true that the plaintiff was injured, but that was the result of an accident, due possibly to his own fault, but at all events not to any fault on the part of the defendant, or to any unlawful obstruction by the defendant of the street. The question involved in the case is, we think, well settled by authority: *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; *Dougherty v. Trustees etc.*, 159 N. Y. 154, 53 N. E. 799. While it is said that these cases involved only the question of liability on the part of a municipality for negligence, they also decided that the existence of objects of this character in the streets is lawful. If the city could not be held liable for permitting them to be there after notice, neither can the defendant be held liable for placing them there. The question involved in this class of cases is whether the object complained of is usual, reasonable, or necessary in the use of the street by the owner of the premises, or anyone else.

We think that the judgment is right, and must be affirmed, with costs.

Parker, C. J., Bartlett, Haight, Martin, Vann, and Landon, JJ., concur.

Obstruction of Street.—A stepping-stone in front of a public building, just inside the curb of the sidewalk, is not such an obstruction as will render a city liable for an injury sustained by a person falling over it, even though others had previously been injured in a like manner: *Du Bois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273.

BANK OF CHINA, JAPAN AND THE STRAITS, LIMITED, v. MORSE.

[168 N. Y. 458, 61 N. E. 774.]

JURISDICTION OF NONRESIDENTS.—The courts of England cannot acquire jurisdiction over a defendant by the service of process on him within the United States, which will enable them to award personal judgment against him. (p. 681.)

FOREIGN LAW—WHEN A QUESTION OF LAW, AND WHEN OF FACT.—Although what is a foreign law is usually designated a question of fact, yet when it merely involves the construction of a written statute or the interpretation of a judicial opinion, it becomes a question of law. (pp. 681, 682.)

APPELLATE PROCEDURE—NEW TRIAL, ORDER GRANTING—WHEN NOT REVIEWABLE.—An order granting a new trial in an action tried by a jury, where there is a conflict in the evidence, and the order may have been upon the facts, is not reviewable, unless it appears by the record that the order was affirmed as to the facts or the appeal therefrom dismissed. (p. 682.)

CORPORATIONS—CALLS BY, WHEN MAY BE RESISTED. A call made by the directors of a corporation or by a court, where there is not personal service of process on the stockholders, is not conclusive evidence of its own necessity, and may be resisted by them if the purpose for which it was made was illegal and unauthorized, without first having it vacated by judicial proceedings. (pp. 682, 683.)

CONFLICT OF LAWS.—THE PROCEDURE IN AN ACTION TO ENFORCE A CALL MADE AGAINST THE STOCKHOLDERS OF A FOREIGN CORPORATION is controlled by the law of the forum. (p. 683.)

CORPORATION—RIGHT OF TO MAKE CALLS TO BE PAID TO A NEW CORPORATION.—Under the English companies' act authorizing the organization of a new corporation and the transfer to it of the business and property of an old one, there can be no transfer to the former of the right to enforce calls against stockholders of the old corporation made for the purpose of procuring moneys to be paid into the treasury of the new one. The old corporation can transfer to the new nothing but the money and property in its possession when the proceeding to wind up is commenced. (p. 687.)

CORPORATIONS.—PROCEEDINGS ON WINDING UP—WHEN NOT JUDICIAL.—Although the voluntary winding up of a corporation is subject to the supervision of a court, this does not make the proceeding judicial so as to be binding on the stockholders, when not authorized by law. (p. 687.)

CORPORATIONS—THE CALLS UPON STOCKHOLDERS MUST NOT BE UNEQUAL as to those of the same class. Hence, if it is proposed to wind up one corporation and form another, to which the property of the first is to be transferred, the call cannot subject to a greater liability those stockholders who do not take stock in the new corporation. (p. 688.)

CORPORATIONS.—CALLS UPON STOCKHOLDERS MUST NOT BE EXCESSIVE. Hence, if, upon proceeding to wind up a corporation, calls are made upon its stockholders greater than necessary to pay its liabilities, they may be successfully resisted. (p. 688.)

JURISDICTION — CORPORATIONS — NONRESIDENT STOCKHOLDERS.—The English companies' act is not extraterritorial, and binds only the persons within the jurisdiction to which the act extends, and no proceeding under it can impose a liability on the stockholders not resident, nor served with process, within that country. (pp. 689, 690.)

CORPORATIONS, FOREIGN—COMITY IN ENFORCEMENT OF CALLS.—A supposed liability against stockholders of a foreign corporation created in the country in which it was organized will not be enforced in the courts of this country if in violation of the policy of our laws, nor when such enforcement must do violence to the rights of our own citizens. (p. 692.)

At the close of the plaintiff's evidence, the defendant moved the court to dismiss the complaint, but the motion was denied, and an exception was taken. After the close of the evidence, the motion was again made to dismiss the complaint, and that the court direct a verdict in defendant's favor. He also asked to go to the jury upon the whole case, as well as upon certain specified questions of fact. The motion and request were refused, the defendant excepted, and the court directed a verdict for the plaintiff. The defendant moved for a new trial, and his motion was denied. The appellate division, on appeal, reversed the judgment of the trial court, and also the order denying the defendant's motion for a new trial. Thereupon the plaintiff appealed to the court of appeals, stipulating for judgment absolute if the order granting a new trial was affirmed.

Stephen H. Olin, for the appellant.

Alexander Tison, for the respondent.

MARTIN, J. This action was to enforce a claim against the defendant as a shareholder of the plaintiff company, under an alleged scheme or agreement for winding up the plaintiff and transferring its property and business to another company. The plaintiff seeks to recover a personal judgment against the defendant, as the holder of 685 shares in the plaintiff company, for the whole amount unpaid thereon, for the benefit of a new corporation, in which he has no interest. The plaintiff has retired from business, is being voluntarily wound up, and all its creditors have been paid. A new company was organized, which has taken to itself the business and property of the plaintiff. It claims to

have thereby acquired the right to enforce payment of calls against the defendant and other shareholders to the full amount unpaid on their shares, or, rather, to indirectly enforce such payment through an action by the plaintiff, a recovery in which would alone benefit the new corporation and its stockholders.

⁴⁶⁵ The plaintiff is an English company and on December 6, 1889, was incorporated by virtue of the English companies act under the name of the "Trust and Loan Company of China, Japan, and the Straits, Limited." Its main office was in London, but it had branches and agencies in China, Japan, India, and other eastern countries. The plaintiff was not organized to do banking, but to loan money, make advances on mortgages and other securities, and to do a general trust and agency business. The plaintiff's memorandum of association seems to contain no provision authorizing it to do a banking business. At first it did not attempt it, and until 1891, did not even post in its office the notice required of all English banks under the companies act. Its original capital was £1,000,000, divided into 99,875 ordinary shares of ten pounds each, of which one pound five shillings was paid, and 1,250 founders' shares of one pound each, which were fully paid up. In February, 1891, it declared a dividend of sixteen per cent on ordinary shares, and eight hundred per cent on founders' shares, besides carrying £55,000 to its reserve fund. At the same time it voted to increase its capital to £2,000,000 by issuing 100,000 additional shares of ten pounds each on which one pound five shillings was to be paid up, and to change its name to its present title. At that time it was stated that the business of the company would continue on its former lines. At the end of the second year the company reported a surplus of £223,629, besides its paid-up capital, and a dividend of eight per cent on the ordinary shares was declared February 29, 1892. In January, 1893, in the report of the company, it was announced that it had lost its entire reserve fund and a part of its capital. In September, 1893, the plaintiff's directors sent out a call of twenty shillings per share, stating in their notices that it was made in consequence of the company having arranged to do general exchange business in China and Japan. This call was quite generally resisted by shareholders as being a departure from the plaintiff's business and beyond ⁴⁶⁶ its powers. The defendant received no notice of that call. In 1891, the defendant, in Yokohama, Japan, purchased through brokers 650 ordinary shares of the plaintiff's stock. They were paid for in Japan, and dividends were paid there. These shares, with

those purchased through an agent elsewhere, were registered in Hong Kong, and comprised the 685 shares to recover a call upon which this action was brought. Later in 1894, the plaintiff having practically abandoned the trust and loan business, and its shareholders having refused to pay calls for doing banking business, its directors decided to adopt a scheme which provided for a new company to take over the business and property of the plaintiff, and to carry on banking in all its branches. The scheme adopted in effect provided that any stockholder of the plaintiff who did not go into the new company, taking share for share, should pay the total amount unpaid upon his old shares. But, if a stockholder took shares in the new company, no calls upon the old shares were to be paid to the plaintiff, and only three pounds, fifteen shillings, were to be paid to the new company. Nominally, the new shares were eight pounds each, but five shillings were to be paid for each share in the plaintiff company surrendered by those coming into the new scheme, leaving four pounds which might be called up, but the stockholders in the new company were informed it would never be needed, and it has never been required. December 3, 1894, this scheme was outlined to certain shareholders and creditors. On the same day an extraordinary meeting of shareholders was called for December 12th to consider, and, if thought best, to adopt, by special resolution under section 161 of the companies act, the scheme for the so-called reconstruction. The meeting was held December 12th, in London, but the defendant was in New York and had no notice of it. No shareholder from any other country was present in person or by proxy. Out of 200,000 shares, over 125,000 were on the eastern register for China and Japan, and less than 75,000 on ⁴⁶⁷ the London register. The notices of the meeting of shareholders were not mailed for transmission to the plaintiff's agents at Yokohama, where the defendant's address was registered, until December 7, 1894, so that a notice could not reach there until after the meeting was held, five days later. The only notice that it is pretended the defendant had of this meeting was a posting of it on the wall of the plaintiff's office in London some time in December. There is no evidence that even one-tenth of the capital issued was represented at that meeting. Still, three resolutions were voted by it: 1. That the company be voluntarily wound up with a view to reconstruction, and that its secretary be named as liquidator; 2. That the liquidator be authorized to consent to the formation of a new company, under such name as the directors approved, with a

memorandum and articles already prepared with the privity and approval of the directors; and 3. That the draft agreement submitted between the company, its liquidator, and a blank company be approved, and the liquidator be authorized, pursuant to section 161 of the companies act, to enter into an agreement with such new company in the terms of the drafted agreement, and to carry it into effect with such, if any, modifications as he might see fit to assent to. Notices convening meetings at which resolutions are to be submitted in favor of proceedings to wind up a corporation under section 161 of the companies act are required to clearly inform the shareholders that it is proposed to proceed under that section. The notices in the proceedings to wind up the plaintiff contained that statement. A new company under the name of "The Bank of China and Japan, Limited," was registered December 28, 1894, the day of the confirmatory meeting. The same persons were directors of the new company as were directors of the plaintiff, and the memorandum and articles previously prepared by them were adopted. On the same day the agreement was signed, and the liquidator applied to the court to summon a meeting of the creditors and to procure the court's sanction to the scheme so that the creditors would be bound. At the same time a supervision order in the ⁴⁶⁸ winding-up proceeding was sought from the court to enable it to continue as a voluntary winding up, as distinguished from a compulsory one by the court, which was asked for by some of the creditors. The scheme made certain provisions for creditors which, when approved by a majority, and sanctioned by the court, were binding upon them. An investigation of the accounts of the old company disclosed that on December 31st, there was an apparent deficit of only £280,000, instead of £800,000, as was claimed by the chairman at the stockholders' meeting less than three weeks before. The scheme was modified in the interest of creditors to avoid an attack by them under section 161. By May 14, 1898, they were paid in full, and only £180,000 in addition to the tangible assets of the plaintiff was required for that purpose. No account was taken of the goodwill of the old company, which was received by the new. As early as May, 1895, it was apparent that not more than £200,000 would be required to pay the debts of the old company. One pound, fifteen shillings, per share, contributed by the stockholders of the old company, who joined the new, paid all the debts of the plaintiff and left a balance of two pounds per share, amounting to £215,000, as capital for the new company. December 12, 1894,

the capital of the plaintiff was £1,643,641, upon which the liquidator claims to have called for the benefit of the new company all that was unpaid on the shares of those who did not come into the scheme, amounting to 126,840 shares and representing a call of about £100,000,000. At the time of the trial only about one-half of the shareholders in the old company had taken shares in the new. The amount of the alleged calls which were uncollected was about £700,000, one-third of which would repay the new company for all it had contributed to discharge the plaintiff's debts. Payment of the call upon the defendant would confer no rights upon him in the new company, and he never agreed to take shares in it. The directors ⁴⁶⁹ of the new company claim that the liquidator has no authority or discretion as to the amount which should be paid upon such calls, but that the whole amount unpaid thereon belongs to the new company, although unnecessary to pay the debts and expenses of the old company, or to equal contributions among its shareholders. The scheme did not provide that the surplus should be divided among the shareholders of the old company, but required it to be paid to the new company for its benefit. Before proceeding to the consideration of the merits of this controversy, it is deemed best to first consider several subsidiary points which relate to the procedure and principles which have more or less bearing thereon.

Although the plaintiff, as a second cause of action, set up a judgment against the defendant, obtained in the English courts in an action wherein the process was served in this state, yet that cause of action appears to have been abandoned upon the trial, evidently on the ground that the English courts had no jurisdiction therein to render a personal judgment binding upon the defendant. The rule is elementary that no sovereignty can extend the process of its courts beyond its territorial limits, or subject either the person or property of a party to its judicial decisions or judgments, where neither he nor his property is within its boundaries. Any attempted exercise of such authority would be beyond the power of the sovereignty to grant, and, as all judicial power must flow from the state or commonwealth, its grant of power is necessarily defined by its boundaries, and no service outside would confer any jurisdiction of the person or property of a defendant so situated. It is, therefore, manifest that the English court acquired no jurisdiction of the defendant which would enable it to award a personal judgment against him, and no judgment or order thus obtained has any force or

effect in this state, either to bind the defendant personally, or his property therein.

We have, in the record, not only the statute relating to the subject involved, but also the decisions of the English courts bearing upon the principal question. Although what the ⁴⁷⁰ foreign law is is usually denominated a question of fact, yet, when it merely involves the construction of a written statute or the interpretation of judicial opinions, it becomes a question of law. The appellant, however, contends that foreign law is to be proved as facts to the court and not to the jury, and then argues that the decision of the appellate division, that the construction and effect of the statute was not a question of fact, but a question of law for the court, was erroneous. That when it becomes necessary to establish the law of a foreign country it must be proved as facts are proved there is no doubt, but when, after such proof is given, the questions involved depend upon the construction and effect of a statute or judicial opinion, we think those questions are for the court, and not questions of fact at all: Chase's Stephen's Digest of the Law of Evidence, 146; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242; Ufford v. Spaulding, 156 Mass. 65, 30 N. E. 360; Molson's Bank v. Boardman, 47 Hun, 135; Story on Conflict of Laws, sec. 638; 1 Greenleaf on Evidence, sec. 486; Kline v. Baker, 99 Mass. 253, 255; Shoe etc. Nat. Bank v. Wood, 142 Mass. 563, 568, 8 N. E. 753.

We may, however, in passing, consider the result that might follow if the theory of the appellant were correct. There was something of a conflict in the evidence as to what the law of England was, and its effect upon the questions under consideration. Upon one hand were the statutes and decisions of the English courts, tending to show that the statute, as construed by the courts of England, did not authorize the plaintiff to transfer to the new company the right to enforce calls upon the shareholders of the old one, nor a right to the proceeds of calls to be subsequently made. On the other hand, the testimony of the experts, whose evidence was read on the trial was to the effect that it was the custom of the courts of England to authorize and sustain such transfers. In this case a motion for a new trial was made upon the exceptions, and because the verdict was contrary to the evidence and contrary to law. This motion was denied by the trial court, and upon appeal was reversed by the appellate division, and a new trial granted. ⁴⁷¹ There is nothing in the order of the appellate division to show that it was

affirmed as to the facts, or that the appeal therefrom was dismissed. This court has frequently and uniformly held that an order granting a new trial in an action tried by a jury, where there is a conflict in the evidence and the order may have been upon the facts, is not reviewable in this court unless it appears from the record that the order was affirmed as to the facts or the appeal therefrom dismissed: *Wright v. Hunter*, 46 N. Y. 409; *Harris v. Burdett*, 73 N. Y. 136; *Snebley v. Conner*, 78 N. Y. 218; *Kennicutt v. Parmalee*, 109 N. Y. 650, 16 N. E. 549; *Voisin v. Commercial Mut. Ins. Co.*, 123 N. Y. 120, 131, 25 N. E. 325; *Peil v. Reinhart*, 127 N. Y. 381, 385, 27 N. E. 1077; *Williams v. Delaware etc. R. R. Co.*, 127 N. Y. 643, 27 N. E. 404; *Chapman v. Comstock*, 134 N. Y. 509, 512, 31 N. E. 876; *Mickee v. Wood Mowing etc. Machine Co.*, 144 N. Y. 613, 39 N. E. 650; *Hoes v. Edison etc. Co.*, 150 N. Y. 87, 44 N. E. 963; *Henavie v. New York etc. R. R. Co.*, 154 N. Y. 278, 280, 48 N. E. 525; *Judson v. Central Vt. R. R. Co.*, 158 N. Y. 597, 600, 53 N. E. 514; *Schryer v. Fenton*, 162 N. Y. 444, 56 N. E. 997; *People v. Clausen*, 163 N. Y. 523, 525, 57 N. E. 739. Therefore, if the contention of the appellant were upheld, it would seem to follow that as the court below may have reversed upon the facts, the order appealed from is not reviewable by this court.

The plaintiff's claim to recover in this action is based upon the theory that it is an English corporation; that the contract of subscription for shares was an English contract which should be interpreted under the English law, and that when the defendant entered into it he agreed to whatever liability the English law imposed upon him as a member of the corporation. If this be assumed, still, if the scheme was one which could not be enforced under the English law, clearly it will not be enforced by the courts of this state. The plaintiff insists that a call, whether made by the directors or by the court, unless directly attacked and set aside by judicial proceedings, is conclusive evidence of the necessity of the call, and binds every stockholder to that extent without service of personal notice upon him. We think that broad proposition cannot be ⁴⁷² sustained, so far, at least, as it affects the question involved in this action. If the purpose for which these calls were made was illegal and unwarranted, it is manifest that under our system of practice and procedure the illegality of the call or the absence of authority to make it can be set up as a defense in an action to recover the amount: Code Civ. Proc., sec. 507. It also seems to be the law

of England that, in an action against a shareholder to recover for a call made upon his shares, it is a defense that the call was not warranted by the constitution or articles of association of the company: *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 Com. B. 775, 811; *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1, 14; *Bloxam v. Metropolitan Ry. Co.*, L. R. 3 Ch. App. 337; *Forrest v. Manchester etc. Ry. Co.*, 30 Beav. 40; *Mant v. Shrewsbury etc. Ry. Co.*, 13 Beav. 1, 5; *Simpson v. Denison*, 10 Hare, 51; *Salomons v. Laing*, 12 Beav. 339. Although in the English courts the method of establishing the illegality of the call may be regulated by a procedure differing from that which obtains in this state, as by obtaining an injunction to restrain the action of the company, or by procuring a judgment setting it aside, still, that would in no way change the result, as the difference relates to a mere matter of procedure. The procedure in this action is controlled by the law of this state, and under our law it is obvious that the claimed illegality can be set up as a defense to an action brought to enforce such a call.

The substantial purpose of this action was to enforce against the defendant a scheme entered into by the plaintiff with the Bank of China and Japan, Limited, and for the benefit of the latter company to recover from the defendant calls made by the plaintiff or its liquidator for the entire amount unpaid upon the shares held by him. Unless, however, the plaintiff's scheme or the procedure under it has in some way imposed upon the defendant a personal liability to pay calls for the benefit of the new company, or unless he is absolutely liable by virtue of his having become the owner and holder of shares of the plaintiff company, independent of and notwithstanding ⁴⁷⁸ such proceeding, it is quite evident that the plaintiff was not entitled to a judgment, and that the judgment directed by the trial court was properly reversed.

The defendant contends that the plaintiff's scheme did not impose upon him a personal liability for the amount unpaid upon his shares, and that he is not liable to pay calls to the plaintiff for the benefit of the new company, to whom the former has attempted to transfer that right. That the plaintiff and its successor were both organized under the English companies act of 1862, and the amendments thereto, and that the winding up of the plaintiff, and the transfer of its business and property to the new company were regulated and controlled by the same statute, is obvious and not denied. Part 4 of the companies act relates to the winding up of companies and associations organ-

ized under it. It first provides for the winding up of such a company or corporation by the court, and, secondly, for a voluntary winding up by its officers and shareholders. The provisions of the statute relating to these two methods, although a part of the same act, are essentially different in several respects. The statute, to an extent, confers upon such an association or company power to determine whether the winding up shall be by the court or voluntary.

Section 161 of that act, which relates to the voluntary winding up of such companies, provides: "Where any company is proposed to be, or is, in the course of being, wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive, in compensation or part compensation for such transfer or sale, shares, policies or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members ⁴⁷⁴ of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up." These provisions, however, are made subject to a proviso that any dissentient member may, by a method therein pointed out, require the liquidator either to abstain from carrying the resolution into effect, or to purchase the interest held by the dissentient member at a price to be determined in a manner therein specified.

That it was the purpose of the plaintiff, and that it and its officers and such shareholders as joined in the proceeding to wind up the plaintiff company intended, to institute proceeding for a voluntary winding up is rendered perfectly plain by examining the notices and other papers therein. It is equally clear that the scheme was entered into in pursuance of that section. In the notices which called the meeting of stockholders and creditors it is specifically stated that the scheme was entered into and the meeting called in pursuance of it. In the minutes of the meetings held December 12th and 28th, in each case,

it is so stated. The scheme as proposed and signed by all the parties thereto, and as it was afterward modified and finally signed, both recited that fact. Therefore, in the further discussion of the questions involved it will be assumed that the proceedings which resulted in the scheme for the transfer of the business and property of the plaintiff to the new company were inaugurated, continued, and carried into effect under and in pursuance of section 161.

Thus we are brought to consider whether, where a corporation or association organized under the English companies act procures the organization of a new company under the same statute to carry into effect the provisions of section 161, and then transfers to the new company all of its business and property, such transfer includes the right of the first company ⁴⁷⁵ to bind its dissenting stockholders to make good by way of calls the sums unpaid on shares held by them for the benefit of the new company, or to enter into a contract to that effect; in other words, whether the old company under a voluntary winding up can make a valid contract binding upon dissenting members to buy the shares of a new one with anything but the existing assets at the time of liquidation. This question is dependent for its solution upon the proper construction of section 161, and, as we have already seen, it is the duty of this court to construe that section in the light of the English authorities, unless foreclosed from examining it by the opinions of witnesses who, without producing any authority showing the existence of such custom or any case in which it was applied, testified upon the trial as to the custom of the courts of England in dealing with such questions. Reverting to section 161, we find that where a company is being wound up voluntarily, the whole or a portion of its business or property may be transferred to another company with the sanction of a special resolution of the original company, and the old company may receive, in compensation for a transfer of its "business or property," shares, policies and other like interests in such company for the purpose of distribution among the members of the company being wound up. The first point presented involves the meaning of the words "business or property" as used in that section. Upon that question we have direct authority in the decisions of the English courts. In *Clinch v. Financial Corp.*, L. R. 5 Eq. Cas. 450, 476, L. R. 4 Ch. App. 117, the question was whether a scheme of amalgamation or reconstruction was valid under section 161 of the companies act. The objection was that by the scheme the corporation being

wound up had disposed of unpaid subscriptions to its shares not yet called, and that it required the liquidator to call from the shareholders of the company a certain amount upon their shares, which was to be turned over to the purchasing company as a portion of the business and property transferred. It was there held that the only question presented was whether that arrangement could ⁴⁷⁶ be supported under section 161 of the companies act. It was further held that there was nothing in that section which authorized the winding-up company to buy shares of another company, with anything but the assets on hand at the time of liquidation, and that it did not apply to assets to be obtained by calls upon the holders of its shares. That case was affirmed upon appeal, and the law as laid down by the vice-chancellor was sustained. In that case the trial court said: "There is nothing in that section which authorizes a contract binding dissentient shareholders to make good, by way of call, the sums of money which may be necessary to make up a call of two pounds a share; in other words, to buy the shares of another company with anything but the assets of the company. Such assets are the assets at the time of liquidation, not assets to be got by subsequent calls, in order to make good an arrangement of this kind, and to force the reluctant shareholders into paying two pounds a share, which will be a payment not for their benefit, if they do not choose to take shares, and, if not for their benefit, then for the benefit of those who do take shares. That would be an act of the most preposterous character—it would give a majority of the shareholders the power of binding the minority, not only to take shares in another concern, but to submit to calls being made upon them for the purpose of raising the sum which was to be so advanced." That case was cited with approval in *Blatchford v. Ross*, 54 Barb. 42, 46. It is to be observed that it is only the business or property of the corporation being wound up that can be transferred under the provisions of that section. When the meaning of the words "business or property" is considered, it is obvious that "business" does not include uncalled capital, and the word "property" has not only been construed as not including calls upon stockholders in the *Clinch* case, but a similar principle of construction has been established by other cases in the English courts: *Stanley's Case*, 4 De Gex, J. & S. 407; *In re Streatham etc. Co.* [1897], 1 Ch. 15; *In re Colonial Trusts Corp.*, L. R. 15 Ch. Div. 465. Not only do ⁴⁷⁷ these cases in effect hold that it was alone the property which the company had in hand at the time of the com-

mencement of its proceedings to wind it up, that it could transfer to the new company, but one of the expert witnesses called by the plaintiff testified that under section 161 no such scheme could be properly passed, and that the Clinch case is a correct interpretation of that section.

But it is insisted by the appellant that inasmuch as the voluntary winding up of the old company was subject to the supervision of the court, that fact affected the operation of section 161, so that the winding up is to be considered, not as a winding up under that section, but as a winding up by the court. This insistence does not, however, seem to be sustained by the decisions of the English courts: *In re Imperial Mercantile Credit Assn.*, L. R. 12 Eq. 504, 513; *In re New Flagstaff Min. Co.* [1889], Week. Not. 123.

Moreover, section 147 of the companies act expressly provides for continuing a voluntary winding up under an order of the court and subject to its supervision. Indeed, such must have been the view taken by the parties, as the order in this proceeding of March 27th shows that the petition of the plaintiff and its liquidator sought for the continuance of a voluntary winding up, subject to the supervision of the court, as opposed to a winding up by the court upon the petition of the creditors, and the order was that the voluntary winding up be continued subject to such supervision. Under these circumstances, we think the plaintiff cannot now be heard to claim that the proceeding was under some other provision of the companies act, or under some other statute, and thus justify its proceedings. Besides, we find no authority, other than section 161 in the companies act, or else where, which would even seem to justify the scheme entered into between the plaintiff and the new company.

The respondent also claims that this scheme was invalid because inequality of treatment of shareholders of the same class was attempted by it. It was plainly unequal as to the plaintiff's ordinary shareholders. If new shares were taken ⁴⁷⁸ by them they were expressly relieved from the payment of seven pounds, fifteen shillings, unpaid on their old shares, and no calls therefor were to be made; if not, all the capital of the old company was to be called and payment enforced immediately, not for the benefit of it or its shareholders, but for the benefit of the new company, which was composed wholly of old shareholders, who took shares in the second company. The apparent purpose of this scheme was to compel all the shareholders of the old company to become shareholders in the new. It must, how-

ever, be conceded that shareholders of the old company could not be compelled to take shares in the new, and we find no authority, statutory or other, to justify a scheme, which imposed upon shareholders, refusing what they might properly refuse, a heavier burden than could otherwise be imposed. The equal and ratable distribution of the assets, and the equal and ratable enforcement of the liabilities of a company, according to the interest of shareholders therein, is equitable and should be enforced, so that each shareholder may receive an equal proportion of the assets and contribute only an equal proportion to discharge its liabilities. This principle, we think, applies as well to the proceeds of calls as to property already in hand. In other words, shareholders have equal rights and must bear equal burdens: 1 Morawetz on Private Corporations, sec. 305. This principle is especially applicable to a proceeding under section 161 of the companies act: *Griffith v. Paget*, L. R. 5 Ch. Div. 894; *Simpson v. Palace Theatre*, 69 L. T., N. S., 70.

Another vice in the scheme entered into is that the calls upon dissenting shareholders were excessive. If paid, they would have produced an amount much greater than was necessary to pay all the debts and liabilities of the old company. Furthermore, it provided that the fund thus raised, instead of being applied to that purpose and the remainder divided between the shareholders, was to be paid over to the new company for its benefit and the benefit of its shareholders. We find no authority that would justify a scheme so unjust and inequitable.

⁴⁷⁹ But the appellant suggests that if there had been a compulsory winding up and the company had realized its assets at their then depreciated values, a call of the total unpaid capital upon all the shares would have been necessary to pay the debts promptly, and thus it attempts to justify its excessive and unequal call. The respondent answers that there was no compulsory winding up or realization at depreciated values, and that if the unpaid capital had been called, the proceeds would have been used for the prompt payment of the debts, without any forced realization upon the assets. There seems to be great force in these suggestions. But be that as it may, it is plain that we cannot deal with unproved suppositions or conjectures in determining the question before us.

The only theory upon which even the plaintiff's experts sought to justify the action of the plaintiff and the new company is based upon a provision in the scheme devised by them to that effect. But then follows the question: Where is there

any warrant for such a scheme? We know of no principle or authority which would justify it. To sustain this scheme the plaintiff relies upon the general assertion of expert witnesses called on the trial, to the effect that such schemes were approved by the English courts. This we cannot regard as controlling, in view of the statute and decisions to which we have already adverted. The plaintiff in its brief has many times asserted that the remedy of the defendant was to have opposed the scheme before it was sanctioned, and that, failing to do so, he was irrevocably bound. The fact is that he knew absolutely nothing of it, or that it was before the court, until long after, so that the remedy suggested could hardly be regarded as complete or available to secure his rights.

Nor do we find anything in the joint-stock companies arrangement act of 1870, which made this scheme, even upon its approval by the court, binding upon the defendant personally. The English companies act is not extraterritorial, and binds only the person or property within the jurisdiction to which the act extends. In *New Zealand etc. Agency Co. v. Morrison* [1898], App. Cas. ⁴⁸⁰ 349, it was held by the house of lords that the joint-stock companies arrangement act of 1870 did not even apply to the English colonies, and, therefore, although a scheme of arrangement under that act was sanctioned by an English court, yet, as to the colonies, it was a proceeding in a foreign court, and could not be pleaded by the company in the Victorian court as a defense to an action by a nonassenting Victorian creditor for the amount of her claim. Thus we see that, under the doctrine established by the English courts, this act was not applicable even to its colonies, and much less can it be held applicable in a foreign jurisdiction. It is, perhaps, true that, so far as the defendant's interest in the old company was concerned, the English courts had jurisdiction to bind him and it, even to the extent of confiscating his interests, yet we know of no principle under which the courts of this state can be required to enforce or be justified in enforcing such a scheme against the defendant personally.

There is no pretense that the defendant ever consented to the plaintiff's scheme, agreed to be bound by it, contracted to pay according to its terms or entered into any contractual relation with the company, its shareholders, or creditors, which rendered him liable thereunder. Nor do we think that any such contract could be implied from the mere purchase of the company's shares. If otherwise, then it is obvious that such a cor-

poration has power to change the contract into which a shareholder originally entered in such a manner and to such an extent as it sees fit, without consultation or consent. If this may be done, the contract of the shareholder may be one thing, when he becomes such, and subsequently changed to quite a different thing. In this case, if such authority could be implied, the result would be that the defendant is made to adopt a contract in which there is a new beneficiary, to consent to inequality of contribution, to excess of calls, and his original contract is in effect wiped out, and a new one substituted in its place entirely without his assent. *Paine v. Cork Co.*, 69 L. J. Ch. 156, is to the effect that even though the articles of incorporation of a company or ⁴⁶¹ association in terms confer upon a liquidator power to sell the assets for shares fully or partly paid up of another company, irrespective of the powers conferred upon him by statute, they are invalid, and the articles cannot deprive dissentients of the benefits conferred upon them by section 161. Although the defendant, by purchasing shares in the plaintiff company, assumed to pay all calls unpaid thereon necessary for the legitimate purposes of the old corporation, to pay its debts and discharge its liabilities, still there was no implied contract upon his part to become liable to pay calls upon his shares for the benefit of another company to whom the interests of the old company had been transferred. Nor could the English courts, by any order made in the proceeding, impose upon the defendant any such personal liability in the absence of personal service or appearance in the winding-up proceeding. As this court recently said, in discussing the effect of a judgment of a foreign state: "If the proceedings involve the determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the state, or voluntary appearance. If it be a proceeding in rem, the res must have been seized or attached, or, at least, must be within the jurisdiction": *Ward v. Boyce*, 152 N. Y. 191, 196, 46 N. E. 180.

This court has held that where a liability sought to be enforced in our state courts has for its foundation the principles of common law and is contractual, it will be enforced upon grounds of state comity: *Stoddard v. Lum*, 159 N. Y. 265, 70 Am. St. Rep. 541, 53 N. E. 1108; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489. But the principle of those cases has no application or bearing upon the question involved in the case at bar. There it appeared that the corporation was insolvent,

that the purpose of the call or the ground upon which a recovery was sought was to procure funds for the payment of its proper and legitimate debts, and it was held that the capital stock of a corporation was a fund set aside for the payment of its debts, and that creditors have a lien upon it which our courts will enforce to an extent necessary to attain that end. But we have never held that ⁴⁸² such a liability will be enforced, unless it exists under the principles of common law or under a contract which ought to be enforced. In *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419, it was said that the liability of a stockholder of another state for the debts of a corporation, in case of its insolvency, created by the statute of such state, while not penal in its nature, is not a liability arising upon contract in a general sense, and that an action to enforce such liability in this state is not maintainable upon the theory that it is contractual and primary. Moreover, the decisions of the English courts, to the effect that the scheme entered into by the plaintiff and the new company was invalid, and that the statute did not make the calls upon, shareholders any part of the assets of the new company, are decisive of the question under consideration.

Under these circumstances, we think the courts of this state should not enforce a liability against one of its citizens, where it is seen that it is illegal, unequal, and oppressive. The general rule is to the contrary, and that courts will not enforce such a liability, when it would be in violation of the policy of our own laws or do violence to what we deem the rights of our own citizens. Hence, it is clear that the courts of this state should decline to enforce the liability sought to be established by this action.

There is, however, one other point which should be considered. The plaintiff insists that even if the scheme of arrangement made between the companies and the liquidator was invalid, it was nevertheless error for the appellate division to reverse the judgment altogether, since it in part rested upon the call of twenty shillings, which was made by the directors. We find nothing to show that the plaintiff, either upon the trial or subsequently, presented or attempted to enforce any claim based upon that call, independently of the other. The whole claim seems to have been treated as one. It was passed upon by the court as a single claim. A judgment was directed for the full amount, and, at this time, after the plaintiff had stipulated for judgment absolute in case no error was committed in granting a new trial, we think it too ⁴⁸³ late to claim that the judgment should have

been for smaller amount. On such an appeal, if the record presents any error, either of law or of fact, made by the trial court which called for a reversal of the judgment, the order of the appellate division must necessarily be affirmed by this court: *Cobb v. Hatfield*, 46 N. Y. 533; *Godfrey v. Moser*, 66 N. Y. 250; *Lake v. Nathans*, 67 N. Y. 589; *Gray v. Board of Supervisors, Tompkins Co.*, 93 N. Y. 603; *Caswell v. Hazard*, 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707. Upon an appeal to this court from an order granting a new trial, the appellant takes the risk, not only of the questions considered below, but of every other exception appearing upon the record. The respondent may sustain the order by showing any legal error, whether noticed by the court below or not. If, in considering such an appeal, the court determine that there was error upon the trial requiring an affirmance of the order, judgment absolute must be given against the appellant: *Mackay v. Lewis*, 73 N. Y. 382; *Noyes v. Wyckoff*, 114 N. Y. 204, 206; *Reed v. McConnell*, 133 N. Y. 425, 430, 31 N. E. 22; *Foster v. Bookwaeter*, 152 N. Y. 166, 46 N. E. 299. We may, however, add that we discover no principle upon which the call for twenty shillings could be enforced under the circumstances disclosed in this action.

In considering the questions in this case we have not omitted to examine the excellent brief of the learned counsel for the appellant and the various cases upon which he relies. Nor have we forgotten his most persuasive and impressive argument. But it is impossible, within the limits to which this opinion should be confined, to examine in detail all the questions and authorities cited or to point out what seems to us the clear distinction between the cases cited by him and the case at bar. We have, however, examined all his authorities without finding any which justified the judgment of the trial court or which would justify us in reversing the judgment of the learned appellate division.

There are several other questions which were presented and argued by counsel and upon which the learned appellate division might have based its order of reversal, but having ⁴⁸⁴ reached the conclusion that the order appealed from should be affirmed upon the grounds already considered we deem it unnecessary, and, therefore, do not specially consider them.

The order of the appellate division should be affirmed, and judgment absolute ordered upon the plaintiff's stipulation, with costs to the defendant in all the courts.

Parker, C. J., Gray, Bartlett, Vann, Cullen, and Werner, JJ., concur.

Jurisdiction Over Nonresidents and Absent Citizens is considered in the monographic note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 179-191.

Foreign Laws are Generally Considered matters of fact: *Myers v. Chicago etc. Ry. Co.*, 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694. Though if the evidence of such laws consists entirely of statutes or reports of judicial decisions, the construction and effect of the statutes and decisions are usually for the court alone: *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 70 Am. St. Rep. 232, 51 N. E. 207.

A Call or Assessment on Stockholders which requires some to pay a higher rate than others will not be enforced. A call must be made on all alike, or it will be void: *Great Western Tel. Co. v. Burnham*, 79 Wis. 47, 24 Am. St. Rep. 698, 47 N. W. 373.

The Statutory Liability of Stockholders in a foreign corporation cannot, as a rule, be enforced, except in the domicile of the corporation, where the law of that domicile is the one which creates the right and the remedies for its enforcement: *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419. See, also, *Ball v. Anderson*, 196 Pa. St. 86, 79 Am. St. Rep. 693, 46 Atl. 366. However, their common-law contractual liability to pay the subscription price of their stock may be enforced in another state: *Stoddard v. Lum*, 159 N. Y. 265, 70 Am. St. Rep. 541, 53 N. E. 1108. See, also, *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

GRAHAM v. STERN.

[168 N. Y. 517, 61 N. E. 891.]

BOUNDARIES, WHEN DO NOT EXTEND TO THE MIDDLE OF A STREET.—IF A MUNICIPAL CORPORATION HAVING TITLE TO THE FEE OF A STREET conveys lands as bounded by and upon it, the conveyance does not extend to the middle, but is limited to the line of the street, because the legal intentment is that it is to remain a public highway. (p. 697.)

The defendant recovered judgment in the trial court, which was affirmed by the appellate division of the supreme court, and the plaintiff prosecuted a further appeal.

John M. Perry, for the appellant.

Julius J. Frank, for the respondents.

⁵¹⁹ GRAY, J. The action is in ejectment, and the title to a parcel of land is involved, which formerly formed part of an old street in the city of New York, as designated upon a map of the city's common lands. The title to the "common lands" was vested in the municipality of the city of New York, and, in 1796, they were surveyed and mapped by ⁵²⁰ Goerck. The

land was platted in numbered lots, or blocks, which were divided by streets, having a uniform width of sixty feet. In 1804 one of these lots, known as No. 155 on the map, was transferred, or leased in perpetuity, to George McKay, by the mayor, etc., of New York and by mesne conveyances it came into the ownership and possession of John Graham, this plaintiff's father. The instrument transferring the land to McKay described it as No. 155 on the map of the common lands, and as bounded on the west by a road, called the "Middle Road" on the map, on the east, in part, by the "East Road," and, in part, by the line dividing the commons of the city of New York from the commons of the town of Harlem, "on the north side by a street of sixty feet in breadth, between the said lot hereby granted and released, and lot No. 156, and on the south side by another street of the like breadth of sixty feet between the lot hereby granted," etc. The plot of land so transferred lay partly within what became the two blocks bounded by Eighty-third and Eighty-fifth streets, and by the Fourth and Fifth avenues. Subsequently, and pursuant to legislation, in 1807 commissioners were appointed for the purpose of laying out the streets in the city. They caused a map to be made showing the new streets, with this result that these new streets and those on the Goerck map did not conform in their lines, and varied somewhat widely. Thereafter applications by property owners affected, of whom Graham, plaintiff's father, was one, were made to the common council for proceedings to readjust boundary lines according to the new map or plan. Action was authorized and taken upon the applications. In 1836 deeds were executed and delivered by and between the mayor, etc., of the city and Graham, whereby the city conveyed to Graham all of the block between Eighty-third and Eighty-fourth streets, and the Fourth and Fifth avenues, with the exception of a small piece of land in the northeast corner, and, simultaneously, Graham conveyed to the city the property which he had theretofore held by title derived under the former transfer to McKay of lot 155, on the Goerck map. The description in the deed by Graham ⁵²¹ appears to have carried the grant only to the side of the street, which had been the northerly boundary of lot 155, reading so far as material to the discussion, thus: "Northeasterly along the same (Fifth avenue), two hundred feet to the southwesterly line or side of a certain other old street; thence southeasterly along the same seven hundred and seventy-six feet and seven inches to the line which divides the commons of the city of New

York from the commons of the town of Harlem," etc. This "old street" mentioned is the same "street of sixty feet in breadth" described in the mayor's deed to McKay. Its territory now lies within the northerly half of the present blocks between Eighty-fourth and Eighty-fifth streets, and the Fourth and Fifth avenues, and the property sought to be recovered in this action is a plot of about fifty feet by thirty feet, within the southerly half of the old street, and near the center of the city block between these streets and Madison and Fourth avenues.

The plaintiff claims that the conveyance to McKay, in 1804, by its description, carried the grant to the center of the old street on its north side, while in her father's reconveyance in 1836 to the city, the description expressly excluded the street, and that, therefore, there still remained in him the title to the southerly half of the street. Undoubtedly, Graham's deed to the mayor, etc., of the city bounded the lands granted by the side of the old street; but whether the mayor's grant to McKay included the half of the street is a question dependent for its answer upon the interpretation which is to be given to the instrument of transfer. The general rule that a conveyance of land bounded by or upon a street carries the fee to the center of the street is founded upon a presumption. It is that, in ordinary cases, there is no reason for supposing an intention in a grantor of lands to reserve the fee in a strip of a street or highway bounding them, when its control and use have ceased to be of importance or of benefit to him: *Haberman v. Baker*, 128 N. Y. 253, 28 N. E. 370. Such a presumption, necessarily, must give way before any evidence of a different intention in the parties. The presumption is not one *juris et de jure*, and yields when the grounds upon which ⁵²² it rests are displaced by other evidence: *Dunham v. Williams*, 37 N. Y. 251. Whether a grant of lands shall be construed as extending to the center of the adjoining street is not decided always by the mere presence of the words, which give rise to the ordinary presumption, but may be decided by the intention of the parties, as it may be gathered from the description, when read with reference to the situation of the lands and the relations of the parties to them, and to the circumstances which enlighten their transaction: See *Mott v. Mott*, 68 N. Y. 246. If the right to the land in the boundary street is rested upon words, which operate by way of presumption and not by way of a precise description, there is no violation of the rules of law in showing, by evidence, what was intended as the boundary line of the grant. This is not

a case of any mistake in the description; but one where the description is ambiguous in its application, and in such a case as that the intention of the parties should, and will, control, and the ambiguity may be removed by the facts in evidence: *Muldoon v. Deline*, 135 N. Y. 150, 31 N. E. 1091.

There are various considerations, which seem to me to oppose themselves to the interpretation, which the plaintiff contends for, with respect to the grant to her father's predecessor in title, McKay. In the first place, it should be borne in mind that Graham, when executing a conveyance of his lands to the city, was acting in accord with the municipal authorities in an effort to readjust boundary lines, which, by the conflict in the maps, had become confused by a rearrangement and exchange of territory, and it is difficult to believe that it was in the understanding or intention of the parties that Graham was not reconveying all that he had title to in the block between Eighty-fourth and Eighty-fifth streets, in exchange for the conveyance to him of the block between Eighty-third and Eighty-fourth streets. In the next place, it is not without significance that the description in the grant to McKay of the northerly boundary is of "a street sixty feet in breadth between the said lot hereby granted and released and lot No. 156." These might well be regarded as words of exclusion as to the land in the street, ⁵²³ and which make the plot granted external to the street; as in the case in *Massachusetts*, to which we are cited: *Codman v. Evans*, 1 Allen, 443. Such significance is merited from the circumstance that the municipality was conveying with reference to a map of its common lands, upon which streets were designated and reserved to be opened for the public use. Be all this as it may, however, there is a controlling consideration, which furnishes a sufficient and, to my mind, a satisfactory answer to the plaintiff's claim, with respect to the grant by the municipality to McKay. There is an obvious and a material distinction between the case of a conveyance by an individual of lands bounded upon, or by, a street and that of a similar conveyance by municipal authorities. The presumption that obtains, ordinarily, in the one case, I think, should be regarded as an offset, in the other, by another presumption that the municipality would not part with the ownership and control of a public street once vested in it for the public benefit. The city was the proprietor of these common lands and they were mapped out for the municipal advantage, in their improvement by future grantees. There was an obvious purpose to subserve, when making grants of lands, in the reten-

tion of the ownership of the soil of the streets, which would be absent in the case of a grant by an individual. The municipality was vested with the fee in the soil of the streets and the trust attached that they should be held and kept open as public streets. It is altogether the sounder proposition, in my opinion, that the grant of title to property, bounded by, or upon, a city street, derived from the public authorities, in the absence of any more definite description, carries only to the line of the street; inasmuch as, in legal intendment, the street was held as, and should remain, a public highway. This principle was applied to the ownership of lands, which formerly formed part of the public lands of the United States, and which bordered upon a stream declared a highway by act of Congress: See *Railroad Co. v. Schurmeir*, 7 Wall. 272, 287; *Yates v. Milwaukee*, 10 Wall. 497, 504.

⁵²⁴ The cases of *Stevens v. Mayor etc. of N. Y.*, 84 N. Y. 296, and of *Sherman v. Kane*, 86 N. Y. 57, are not in point. The opinions in this court discussed no such question as we have presented to us now. In the former case the plaintiff sought to recover against the city upon the ground of fraud and deceit in procuring a release of the plaintiff's title to certain premises, and the opinion of this court passes only upon questions relating to the issues presented and to their trial. In the second case the opinion passed upon the questions of the right of the city to claim a title by adverse possession of the premises described, and of whether there had been a practical location of a boundary line by acquiescence.

I think the dismissal of the complaint was right, and I advise the affirmance of the judgment appealed from, with costs.

Parker, C. J., Bartlett, Martin, Vann, Cullen, and Werner, JJ., concur.

Judgment affirmed.

Boundaries.—A deed of a city lot bounded on one side by a street carries to the center of the street, in the absence of any language showing an intention to exclude the street: *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 32 Am. Rep. 719; *Salter v. Jonas*, 39 N. J. L. 469, 28 Am. Rep. 229; although the distances in the deed bring the line only to the side of the street: *Cox v. Freedley*, 33 Pa. St. 124, 75 Am. Dec. 584; *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649. But a deed does not carry to the center of the street where it calls specifically for the side of the street: Note to *Firmstone v. Spaeter*, 30 Am. St. Rep. 853.

WAMSLEY v. ATLAS STEAMSHIP COMPANY.

[168 N. Y. 533, 61 N. E. 896.]

CARRIERS—CONVERSION BY—WHAT IS NOT.—The mere delay in the delivery of goods by a common carrier is not a conversion thereof. A conversion implies a wrongful act, a misdelivery or wrongful disposing or withholding of the property, not a mere nondelivery or refusal to deliver on demand, if the goods have been lost through negligence or been stolen. (p. 700.)

CARRIER—WHEN NOT GUILTY OF CONVERSION.—The fact that a carrier by steamship, on demand, failed to deliver property, expressing its inability to do so, does not make it guilty of a conversion, though the property is subsequently found on the vessel, but not in the place where it was stored, if there is nothing to show the circumstances of its removal from that place, and it may have been stolen by a fellow-passenger or misplaced by one for whose acts the carrier was not responsible. (p. 702.)

PRACTICE—FORM OF ACTION—WHEN MAY NOT BE DISREGARDED.—When the complaint alleges a conversion, and the action is tried on that theory, a judgment in trover must be supported by the evidence necessary at the common law. The court cannot disregard the pleadings and give judgment for the plaintiff on some other theory. (p. 703.)

Action in trover to recover for the conversion of a box of negatives. The plaintiff's assignor, S. F. Massey, took passage on one of the defendant's steamships, and, among the personal effects which he took on board, was a box of negatives and photographic prints. They were placed in the storeroom of the vessel, but upon its arrival in New York could not be found. It was discovered about two months later, and after the commencement of the present action, and being then tendered to the plaintiff, he refused to receive it. It was found in a different part of the vessel from that where it was stored, and there was nothing to show how it was removed from the storeroom or placed where found. A verdict in favor of the plaintiff in the trial court was affirmed by the appellate division.

Everett P. Wheeler, for the appellant.

Alexander S. Bacon, for the respondent.

538 WERNER, J. The action was brought and tried upon the theory that the defendant was liable as for a conversion. The complaint is silent as to the relations which existed between the defendant and plaintiff's assignor at the time of the alleged conversion, but the answer asserts, and the evidence

establishes, the relation of carrier and passenger. The question of defendant's liability as for a conversion must, therefore, be determined in the light of that relation. There are cases in which evidence of demand and refusal is sufficient to sustain a recovery in conversion, but this rule applies against common carriers only in exceptional cases. The general rule is that a common carrier is not liable in conversion for mere nonfeasance, although he may be liable for negligence. So, on the contrary, he may be held in trover when he is guilty of misfeasance, although the wrong may have been unintentional. The principle is thus stated in *Hawkins v. Hoffman*, 6 Hill, 588, 41 Am. Dec. 768: "Trover will lie when goods have been lost to the owner by the act of the carrier, though there may have been no intentional wrong; as when goods are by mistake, or under a forged order, delivered to the wrong person. But it will not lie for the mere omission of the carrier; as where the property has been stolen or lost through his negligence, and so cannot be delivered to the owner. Mere nonfeasance does not work a conversion of the property, and although the owner may have another action he cannot maintain trover." In that case a trunk was lost, and in referring to the fact the court continued: "A demand and refusal would not alter the case; for as the trunk was either stolen or lost the defendant could not deliver it. Demand and refusal are ⁵⁸⁷ only evidence of a conversion where the defendant was in such a condition that he might have delivered the property if he would." In *Packard v. Getman*, 4 Wend. 615, 21 Am. Dec. 168, the supreme court said: "Trover lies not against a carrier for negligence, as for losing a box, but it does for an actual wrong, nor for goods lost or stolen from a carrier or wharfinger; there must be an injurious conversion, something more than a bare omission. Where a carrier loses goods by accident, trover does not lie; but where he is an actor and delivers them to a third person, though by mistake, the action lies. It also lies where the defendant refuses to deliver the goods according to contract, he having the possession. But if lost or stolen, so that he cannot deliver them, and his inability does not arise from any act of his own, trover does not lie, though case does." To the same effect is *Briggs v. New York Cent. R. R. Co.*, 28 Barb. 515, where it was held that "a mere delay in the delivery of goods by a common carrier is not a conversion thereof, nor will it entitle the owner to recover the value thereof." Following these cases and citing with approval the authorities upon which they are based, this court, in *Magnin v. Dinsmore*, 70 N.

Y. 417, 26 Am. Rep. 610, thus stated the law of conversion as applied to common carriers: "A conversion implies a wrongful act, a misdelivery, a wrongful disposition or withholding of property. A mere nondelivery will not constitute a conversion, nor will a refusal to deliver, on demand, if the goods have been lost through negligence, or have been stolen." The case last cited was brought against the president of an express company to recover the value of certain watches delivered to that company by the plaintiff for transportation to a consignee in Memphis. The question was whether the plaintiff was limited to a recovery as for defendant's negligence by the conditions of the contract of carriage, or whether plaintiff could recover the full value of the goods in conversion. In referring to the decision of this court upon a former appeal in that case the court said: "This court held that the nondelivery of the goods with the other proofs in the case was evidence of negligence to be submitted to the ⁵³⁸ jury, and that the onus was upon the defendants to show that they were lost without the negligence of the carriers or their servants. But an action for a conversion will not be sustained upon such evidence alone."

The facts in this case are practically undisputed. Although the complaint alleges a demand and refusal, and the answer admits the allegation so far as it relates to the demand made by the plaintiff, the evidence shows that the refusal was merely technical and not actual. The defendant, believing that the box of negatives had either been lost or stolen, simply expressed its inability to deliver the same. Although the box was subsequently found on board defendant's vessel "Alleghany," under circumstances which raised the presumption that it had not been removed from the ship, there was no evidence showing the circumstances of its removal from the storeroom in which it had been originally deposited. It may have been stolen by a fellow-passenger, or have been removed and misplaced by some one for whose acts the defendant was not responsible in an action for conversion, although liable for negligence.

This brings us to the defendant's request to charge, which raises the serious question in the case. The court was asked to charge the jury, "in such case the defendant can only be made liable in this action upon proof of actual conversion of the box of negatives." The court declined to charge otherwise than it had already charged, and defendant's counsel excepted. Unless the court had the right to instruct the jury, as a matter of law, that the defendant was guilty of conversion, this request should have

been charged if the instruction had not previously been given. A brief reference to the salient facts will suffice to show that the court would not have been authorized to hold, as a matter of law, that the defendant was guilty of conversion. The facts, although substantially undisputed, were such as to support conflicting inferences. The box of negatives was placed in the storeroom of the vessel by one of the defendant's servants. When the owner disembarked, it could not be found. A camera belonging to him had been surreptitiously taken from his stateroom, and some jugs of water that had ⁵³⁹ been placed in the storeroom with the box of negatives were also missing. The camera was recovered under circumstances indicating that it had been stolen, but the record is silent as to the circumstances of the theft or the identity of the thief. The jugs of water were found the day after the loss was reported to the ship's officers. The box of negatives was not recovered until after the lapse of several months, when it was found in the forepeak of the vessel among some signal rockets. How it came to be there is a matter of conjecture. Whether it was stolen by the same person who took the camera, or whether it was taken by one of the defendant's employes under the belief that it contained brandy, as indicated by the marks on the box, does not appear. Conceding that the defendant is liable in conversion for the misfeasance of its servants, we must also admit that the evidence does not affirmatively disclose any such misfeasance. As we have seen, the theft or loss of the goods through the mere nonfeasance of the carrier does not render him liable in conversion. The mere fact that the box was actually on board the defendant's ship is not necessarily inconsistent with the view that it may have been stolen or lost. If, for instance, the box had been stolen by one for whose acts the defendant was not responsible, it would be none the less a theft, because it had been secreted in some inaccessible part of the vessel instead of being hidden elsewhere. So, if by mistake the box had been taken by a passenger, who, after discovering that it did not belong to him, had placed it where it could not be found, there might be a case of negligence against the defendant when the facts would not support a charge of conversion. These suggestions sufficiently indicate the necessity, under the evidence herein, of a direct and explicit charge to the jury that the plaintiff could not recover in this action unless he had made proof of actual conversion.

Let us now see whether the charge as it stood prior to this request had fairly and sufficiently instructed the jury upon this

point. The following quotation contains all that was said on that subject: "If the said box was discharged from the ship and⁵⁴⁰ passed by the custom-house inspectors, and thereupon left on the dock at pier 6, subject to Lieutenant Massey's risk, and it was thereafter taken on board at Lieutenant Massey's request and at his risk, the defendant is entitled to your verdict. But if these matters did not occur, if the box did not come out of the ship until after it was finally discovered, after repeated search, it will be for you to say whether the conduct of the defendant or its servants, by which the box became mixed up with a lot of other boxes containing signals, was, under all the circumstances disclosed, excusable or justifiable, so as not to make defendant liable for its failure to deliver on demand." It will be seen that this charge not only fails to cover the point made by the request, but it assumes that the defendant or its servants removed this box and mixed it with the signals, and upon that assumption the jury was left to say whether such conduct was "excusable or justifiable." We think it was error for the court to decline to charge the substance of the request above referred to.

This view of the case renders it unnecessary to discuss the other points made by the defendant. We may simply add that this is not a case in which the power of the court to disregard mere forms of pleading can be invoked in aid of the plaintiff. The complaint alleged conversion and the case was tried on that theory. While no particular form of complaint is now essential to a recovery under our code practice (section 481), and courts are authorized to disregard errors and defects in pleadings, or other proceedings which do not affect the substantial rights of the adverse party (section 723), it is none the less true that the substantial differences which control and determine the rights of parties are still in force: *Pomeroy's Remedies and Remedial Rights*, sec. 108; *Goulet v. Asseler*, 22 N. Y. 225; *Eldridge v. Adams*, 54 Barb. 417. The case having been tried upon the theory of a conversion, the judgment in trover must be supported by the same proof that was necessary under the common law.

The judgment of the court below should be reversed, and a new trial ordered, with costs to abide the event.

Judge Bartlett dissented, saying that he could not agree that there was an "utter failure of proof upon the subject of the removal of the lost box of negatives from the storeroom in which it had been originally deposited aboard this ship," and that the evidence, "while possibly open to conflicting inferences, justified the conclusion that

the defendant corporation, by the acts of its servants, was chargeable with the conversion of this box, and that the verdict of the jury is conclusive."

Judge Vann concurred in this dissenting opinion.

Conversion Upon Which Trover may be Based must be a positive tortious act. Nonfeasance or neglect of legal duty, or mere failure to perform an act made obligatory by contract, or by which property is lost to the owner, will not support the action: *Bolling v. Kirby*, 90 Ala. 215, 24 Am. St. Rep. 789, 7 South. 914. See, also, *Terry v. Birmingham Nat. Bank*, 98 Ala. 599, 30 Am. St. Rep. 87, 9 South. 299; monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 795-819.

Conversion by Carrier.—The refusal of a carrier to surrender goods in his possession to the rightful owner constitutes a conversion: *Shellenberg v. Fremont etc. R. R. Co.*, 45 Neb. 487, 50 Am. St. Rep. 561, 63 N. W. 859. But mere nondelivery by a carrier will not constitute a conversion, nor will refusal to deliver on demand, if the goods have been lost through negligence or have been stolen. There must be proof of a wrongful disposition or wrongful withholding: *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608; *Packard v. Getman*, 4 Wend. 613, 21 Am. Dec. 166; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

MIZELL v. McGOWAN.

[129 N. C. 93, 39 S. E. 729.]

WATERS AND WATERCOURSES—INCREASE AND ACCELERATION.—No one has a right to divert water from its natural course so as to damage another, though he may increase and accelerate it. (p. 705.)

WATERS AND WATERCOURSES—DRAINING ONE'S OWN LAND.—A man can dig ditches wherever he pleases upon his own land, provided he runs them into a natural watercourse before leaving it, subject only to the limitation against diversion. (p. 707.)

A. M. Moore, for the plaintiff.

Skinner & Whedbee and Jarvis & Blow, for the defendants.

DOUGLAS, J. This is an action for damages to the plaintiff's land from flooding alleged to have been caused by the improper and unlawful construction of ditches by the defendant.

This is the third time it has been before this court, being reported in *Mizell v. McGowan*, 120 N. C. 134, 26 S. E. 783, 125 N. C. 439, 34 S. E. 538.

The following are the issues and answers thereto: "1. Is the plaintiff the owner and in possession of the lands described in the complaint? A. Yes. 2. Did Mrs. Laura A. McGowan wrongfully and unlawfully divert any water from its natural channel and discharge it upon the lands of plaintiff, causing damage to same? A. No. 3. What damage, if any, has plaintiff sustained by reason of the wrongful diversion of said water? A. Nothing."

We think these were the proper issues, and covered every contention left open to the plaintiff in view of the opinions already rendered by this court in this case. We see no reason to depart from the rule we have laid down, and which may now be considered settled, that "neither a corporation nor an individual can divert water from its natural course so as to damage another. They may increase and accelerate, but not divert": *Hocutt v. Wilmington etc. R. R. Co.*, 124 N. C. 214, 32 S. E. 681; *Mizell v. McGowan*, 125 N. C. 439, 34 S. E. 538; *Lassiter v. Norfolk etc. R. R. Co.*, 126 N. C. 509, 36 S. E. 48. The question of diversion was all that was left to the plaintiff, and that was submitted to the jury under instructions that appear to us without error.

We are aware that great hardship may sometimes occur ⁸⁸ from the unlimited right of increase and acceleration, and that there are some authorities limiting it to the capacity of the natural outlet; but we must adhere to the rule as the result of our deliberate judgment. However short it may fall as a theoretical definition of ideal right, we can frame none better that is capable of practical application.

Its limits are clearly defined by the natural landmark of the watershed, which, seen of all men, renders it easy of application and capable of definite proof. Any other rule would prevent the drainage of large bodies of swamp lands of great natural fertility and capable of the highest degree of improvement, but now worse than useless. They will eventually be needed to support an ever-increasing population, and to shut them up indefinitely as the mere homes of disease is repugnant to the highest principles of public policy and of private right. Suppose the natural capacity of the watercourse was made the test of the rule; it would be so extremely difficult of application as practically to destroy its value. What is the natural capacity of a stream? Is it measured at low water or at high water? Almost any stream can carry off whatever water may be made to flow into it in dry weather, or perhaps even in ordinary times. On the contrary, the clearing up of our lands is having the double effect of greatly accelerating the flow of water and at the same time filling up our streams with sand, so that very few of them can now carry the water naturally flowing into them after heavy rains.

Again, suppose the upper tenant were compelled to regard the natural capacity of the stream, how far down would this limitation extend? Naturally, many others would drain into

the same stream, so that the land owner near its mouth would get the accumulated waters of all those above him. In case of injury, how would he apportion his damages, and where would the liability of each tortfeasor begin and end? These ⁹⁶ questions, it seems to us, would severely tax the utmost ingenuity of the courts, and leave the jury in such a state of perplexity as to seriously endanger their intelligent determination of the issues.

It is contended by the defendant that chapter 30 of the code should be taken as determining this case. We do not think so. Those sections by their very terms apply to artificial outlets, such as ditches and canals, and not to natural watercourses. A man can dig ditches wherever he pleases upon his own land, provided he runs them into a natural watercourse before leaving his own land, subject only to the limitation against diversion. But if he cannot reach a natural watercourse without going into the lands of another, he must proceed under chapter 30 of the code. The scope of this chapter is indicated in section 1297, which is in part as follows: "Any person owning pocosin, swamp or flat lands, or owning lowlands subject to inundation, which cannot be conveniently drained or embanked so as to drain off or dam out the water from such lands, except by cutting a canal or ditch, or erecting a dam through or upon the lands of other persons, may, by petition, apply to the superior court of the county," etc.

In the case at bar the defendant has not cut any ditch upon the lands of the plaintiff, nor does she wish to do so. She has simply, by means of her own ditches, turned into a natural watercourse upon her own land increased and accelerated but undiverted waters. The rules governing natural and artificial watercourses as outlets through the lands of another are essentially different—this opinion dealing exclusively with the former.

The judgment is affirmed.

THE RIGHT OF ONE LAND OWNER TO ACCELERATE OR DIMINISH THE FLOW OF WATER TO OR FROM THE LANDS OF ANOTHER.

I. Diminishing or Impeding the Flow of Streams.

a. By Bridges.

b. By Dams.

1. Right Generally.

2. Detention for Reasonable Use.

c. By Other Means.

- II. Diminishing or Impeding the Flow of Surface Water.**
 - a. Water Flowing onto One's Land.**
 - 1. Common-law Rule.
 - 2. Civil-law Rule.
 - 3. Modified Rule.
 - b. Water Flowing Off of One's Land.**
- III. Accelerating or Increasing the Flow of Streams.**
- IV. Accelerating or Increasing the Flow of Surface Water.**
 - a. Ordinary Drainage Over Another's Land.**
 - b. Discharging Surface Water in Large Quantities.**
 - c. Discharging Surface Water into a Stream or Natural Channel.**
- I. Diminishing or Impeding the Flow of Streams.**

By diminishing the flow of water we shall mean more particularly the right to impede its flow by dams or other means, instead of the right to diminish the flow of water by taking it from a stream for domestic, irrigation, or other purposes. This latter occupies a large field of the law by itself, and cannot, without undue length, be properly treated here.

a. By Bridges.—No one has the right to obstruct the flow of a navigable stream by means of a bridge, so as to injure another, and hence, if a bridge is built, it must be so constructed as to carry off the water effectually: *Ohio etc. Ry. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; *McCleneghan v. Omaha etc. R. R. Co.*, 25 Neb. 523, 13 Am. St. Rep. 508, 41 N. W. 350; *Omaha etc. R. R. Co. v. Brown*, 29 Neb. 492, 46 N. W. 39. The same rule is true where a bridge is built over a non-navigable stream: *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491; *Rowe v. Granite Bridge Corporation*, 21 Pick. 344; *Lawrence v. Inhabitants of Fairhaven*, 5 Gray, 110; *Talbot v. Whipple*, 7 Gray, 123; *Flick v. Pennsylvania R. R.*, 157 Pa. St. 622, 27 Atl. 783; *Smith v. Philadelphia etc. R. R. Co.*, 57 Fed. 903. And if, by reason of such an obstruction, the water is dammed up and set back on the land of another, in consequence of which such land is damaged, the owner of the bridge is liable: *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; *Lawrence v. Inhabitants of Fairhaven*, 5 Gray, 110; *Gillespie v. Forrest*, 18 Hun, 110; *Flick v. Pennsylvania R. R.*, 157 Pa. St. 622, 27 Atl. 783; *Smith v. Philadelphia etc. R. R. Co.*, 57 Fed. 903. Thus, the leaving of piling, used while constructing a bridge across a river, standing after its completion, so as to collect debris and cause the river to overflow, will render the company building the bridge liable for resulting damage: *Hagge v. Kansas City etc. Ry. Co.*, 104 Fed. 391. If one kind of bridge will necessarily impede the flow of water and ice reasonably to be expected to pass in the stream, and another bridge equally safe would not impede the flow of

the stream, the latter kind must be selected: *McCleneghan v. Omaha etc. R. R. Co.*, 25 Neb. 523, 13 Am. St. Rep. 508, 41 N. W. 350.

A bridge must be large enough to allow to properly pass all the water which usually flows in the stream, including such usual and ordinary floods as might be reasonably expected to occur: *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; *St. Louis etc. R. R. Co. v. Winkelmann*, 47 Ill. App. 276; *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Higgins v. New York etc. R. R. Co.*, 78 Hun, 567; *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, 9 S. E. 139; *Brown v. Pine Creek Ry. Co.*, 183 Pa. St. 38, 38 Atl. 401. Hence, where a pier of a bridge was turned obliquely to the course of a river, so as to turn the water of the stream, in times of ordinary freshet, upon the plaintiff's land, injuring it, the owners of the bridge are liable: *Spencer v. Hartford etc. R. R. Co.*, 10 R. I. 14. If a stream is accustomed, in times of high water, to flow in a very broad, but still definable, stream, any bridge built over it must provide for such condition when the stream is high: *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339. A bridge must be of sufficient capacity to provide for such extraordinary floods as may be expected to occur, although they are infrequent: *Higgins v. New York etc. R. R. Co.*, 78 Hun, 567. Hence, where in a period of forty-two years there had been five floods as great as the one in question, a finding of the jury that the flood was an ordinary one, requiring a railroad company which built a bridge to anticipate it in constructing the bridge, will be sustained: *Brown v. Pine Creek Ry. Co.*, 183 Pa. St. 38, 38 Atl. 401. And while floods which may be expected in the ordinary course of nature, though of but occasional occurrence, must be provided for, a bridge need not be constructed so as to carry off overflows which result from extraordinary and unprecedented rainfalls: *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, 9 S. E. 139; *Fick v. Pennsylvania R. R.*, 157 Pa. St. 622, 27 Atl. 783; *Treichel v. Great Northern Ry. Co.*, 80 Minn. 96, 82 N. W. 1110; *Central Trust Co. v. Wabash etc. Ry. Co.*, 57 Fed. 441. The magnitude of the storm, and whether the bridge was large enough, under the circumstances, are questions properly left to the jury: *Temple v. St. Louis etc. Ry. Co.*, 83 Mo. App. 64.

b. By Dams.

1. Right Generally.—At least so far as non-navigable streams are concerned, a riparian owner has a limited right to dam it in order to utilize it. Its natural flow may be diminished or even entirely stopped for a reasonable length of time, for the purpose of making a reasonable use thereof: *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404; *Housee v. Hammond*, 39 Barb. 89; *Pitts v. Lancaster Mills*, 13 Met. 156; *Cooper v. Hall*, 5 Ohio, 320; *Hayes*

v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; *Oregon Iron Co. v. Trullenger*, 8 Or. 1.

In damming a stream, a riparian owner must not impede it so as to materially interfere with the rights of other owners: *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; for he has no unlimited right to use the stream by stopping its natural flow, to the injury of either an upper or lower riparian owner: *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404. Hence, if a dam unduly raises the waters of a stream, so that it backs up and overflows the lands of an upper owner, liability will attach for the injury caused: *Eagle etc. Mfg. Co. v. Gibson*, 62 Ala. 369; *Ramsay v. Ohandler*, 3 Cal. 90; *Taylor v. Keeler*, 50 Conn. 346; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Stone v. Roscommon Lumber Co.*, 59 Mich. 24, 26 N. W. 216; *Liles v. Cawthorn*, 78 Miss. 559, 29 South. 834; *Hutchinson v. Coleman*, 10 N. J. L. 74; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Keller v. Stoltz*, 71 Pa. St. 356; *Allen v. McCorkle*, 8 Head, 181; *Shaw v. Etheridge*, 7 Jones, 225.

It is immaterial whether the injury is to the lands of the upper owner, or to his mills or other property: *Taylor v. Keeler*, 50 Conn. 346; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265. But one who erects a dam need not regard the peculiar necessities of upper owners, arising from the size of their mills or ponds, or the peculiar nature of their work, if the damming up of the stream is only a reasonable use thereof: *Gould v. Boston Duck Co.*, 13 Gray, 442. He may not, however useful it may be to him, throw back water in any appreciable degree, however small, upon the proprietor above him: *Liles v. Cawthorn*, 78 Miss. 559, 29 South. 834. Even if the overflow of water is prevented by embankments, if by reason of the dam the water is raised and percolates through the natural banks to the land of another so as to injure it, the owner of the dam is liable: *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72. The water power to which a riparian owner is entitled consists of the fall in the stream when in its natural state, where it first touches his land, and the surface where it leaves it. Hence, if a dam of a lower owner raises the water above this level, liability attaches for any resulting damage: *McCalmont v. Whitaker*, 8 Rawle, 84, 23 Am. Dec. 102. A dam cannot be maintained over such lawful height, and even the slightest excess may entitle one injured thereby to damages: *James v. Sterrett*, 137 Pa. St. 234, 20 Atl. 655. See *Irwin v. Richardson*, 88 Wis. 429, 60 N. W. 786. Though instrumental leveling shows more fall on the land than the owner has height at his dam, yet if the actual facts show a swelling back of the water upon an upper owner's land farther than before the erection of the dam complained of, the instrumental measurements must yield to the actual facts as shown on the ground: *Brown v. Bush*, 45 Pa. St. 61.

If the erection of a dam obstructs the flow of ice in the stream, causing damage to an upper owner, liability will attach: *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287. So, also, where the water is thrown back on another's land in such increased quantities as to interfere with the running of a mill: *Burnett v. Nicholson*, 86 N. C. 99; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Lincoln v. Chadbourne*, 56 Me. 197; *Rothery v. New York Rubber Co.*, 24 Hun, 172. The same liability attaches for overflowing machinery as for overflowing land: *Webster v. Fleming*, 2 Humph. 518. And for raising the water so as to obstruct the natural drainage of other land lying near, though it may not border on the watercourse: *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Bowman v. New Orleans*, 27 La. Ann. 501; *Treat v. Bates*, 27 Mich. 390. And also for such obstruction by a dam as prevents the plaintiff's mining tailings from being carried off by the natural flow of the stream: *Sims v. Smith*, 7 Cal. 148, 68 Am. Dec. 233. Damage by overflowing of an upper owner is deemed a taking of property within the meaning of the constitutional prohibition, and cannot be done without making compensation therefor: *Weaver v. Mississippi etc. Co.*, 28 Minn. 534, 11 N. W. 114.

Where the erection of a dam will cause stagnant water, which will be injurious to health and produce a nuisance, its erection may be restrained, or it may be abated after its erection, and damages recovered for all injury caused: *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112; *Mayor v. Minor*, 73 Ga. 484; *Treat v. Bates*, 27 Mich. 390; *People v. Townsend*, 8 Hill, 479; *Neal v. Henry*, Meigs, 17, 83 Am. Dec. 125.

While a person may erect a dam in a stream for certain useful purposes, he must calculate the effect at ordinary times and also at periods of high water, and should so construct it that ordinary and expected floods will not cause an overflow to the damage of upper owners, for he will be liable for all damages caused thereby: *Bell v. McClintock*, 9 Watts, 119, 34 Am. Dec. 507; *Casebeer v. Mowry*, 55 Pa. St. 419, 93 Am. Dec. 766; *Connecticut v. Ousatonic Water Co.*, 51 Conn. 137; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236. One who erects a dam may keep the water at such a height as to swell it up to his neighbor's line, but is liable for any overflow which may be caused by high water which is usual and could be reasonably anticipated: *Dorman v. Ames*, 12 Minn. 451; since he has no right to maintain a dam at such a height as to raise and set the water back upon an upper riparian owner at seasons of ordinary high water: *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245, 6 N. W. 787. But the owner of a dam is not liable for damages occasioned by extraordinary and unexpected floods: *Bell v. McClinstock*, 9 Watts, 119, 34 Am. Dec. 507; *Inhabitants of*

China v. Southwick, 12 Me. 238; *Cobb v. Smith*, 38 Wis. 21. If the dam, at the time it was erected, was not injurious to upper land on which a mill is located, the obstruction of the water occasioned by an unusual and unprecedented inflow of water from the working of mines above the dam will not render the owner of the dam liable for consequent injury to the mill: *Proctor v. Jennings*, 6 Nev. 83, 8 Am. Rep. 240. There is no liability if the flood is unexpected and unforeseen, although it was not unprecedented: *Pittsburg etc. Ry. v. Gilleland*, 56 Pa. St. 445, 94 Am. Dec. 98; *People v. Utica Cement Co.*, 22 Ill. App. 159.

2. **Detention for Reasonable Use.**—As already intimated, in the cases cited, streams may be detained or impeded in their flow for the purpose of making a reasonable use of them. As was held in *Oregon Iron Co. v. Trullenger*, 3 Or. 1, the right to use water necessarily implies a right to dam and to detain it, but one must not detain it unreasonably. The erection of a dam is probably injurious to some extent to all mills situated below it, because the water is in part and at times withheld, yet this does not furnish a ground of action if the use for which the water is withheld is a reasonable one: See *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 233; *Phillips v. Sherman*, 64 Me. 171; *Ware v. Allen*, 140 Mass. 513, 5 N. E. 629. Judge Cooley states the rule, as it is now generally recognized everywhere, thus: "As between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether, under all the circumstances of the case, the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other. . . . It is a fair participation and reasonable use by each that the law seeks to protect. Such interruption in the flow as is necessary and unavoidable by the reasonable and proper use [thereof] cannot be the subject of an action. As was said by Mr. Justice Story, in *Tyler v. Wilkinson*, 4 Mason, 401, Fed. Cas. No. 14,312, to hold that there can be no diminution whatever, and no obstruction or impediment whatsoever, by a riparian proprietor in the use of water as it flows, would be to deny any valuable use of it. There may be, and there must be, allowed of that which is common to all a reasonable use by each. . . . It is, therefore, not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances, combined with injury, that will give a right of action, if, in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the com-

mon right can demand no redress": *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102. This case also contains an excellent review of the authorities.

One has no right to unnecessarily and unreasonably detain the waters of a stream from those who have a right to use it subsequent to him: *Phillips v. Sherman*, 64 Me. 171. And what is a reasonable use, and what an unreasonable detention, are questions of fact for the jury: *Phillips v. Sherman*, 64 Me. 171; *Thurber v. Martin*, 2 Gray, 396, 61 Am. Dec. 468; *Springfield v. Harris*, 4 Allen, 496, 81 Am. Dec. 715; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526. In *Hetrich v. Deachler*, 6 Pa. St. 32, what was a reasonable use when the stream was low was left to the jury; as was also the case in *Denison Mfg. Co. v. Robinson Mfg. Co.*, 74 Me. 116, where water was detained during a period of drought.

What constitutes a reasonable use depends upon the particular facts and circumstances of each case. In *Timm v. Bear*, 29 Wis. 254, the court said: "In determining this question, regard must be had to the subject matter of the use, the occasion and manner of its application, its object, extent, and the necessity for it, to the previous usage, and to the nature and conditions of the improvements upon the stream; and so, also, the size of the stream, the fall of water, its volume, velocity and prospective rise and fall, are important elements to be considered. The nature and situation of the plaintiff's mill and pond, the limited capacity of the latter, and the absence of any means or facilities by which it could be enlarged so as to retain and hold the water of the stream when discharged in quantities larger than its ordinary and accustomed flow or current, were, therefore, circumstances not to be overlooked in determining the reasonableness of the defendant's use." A similar rule was laid down in *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526, *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385, *Pollitt v. Long*, 3 Thomp. & C. 232, and *White v. Whitney Mfg. Co.*, 60 S. C. 254, 38 S. E. 456. In *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636, it was pointed out that small streams could be made practically useful as a power for propelling mills and machinery only by accumulating their waters in this way, and that the right to detain their waters was not limited to the time necessary for repairs, or to extraordinary occasions, but that such detention was the common and ordinary way in which the water power on such streams was made valuable.

An upper mill owner generally has no right to detain the waters of a stream longer than is necessary to raise a suitable head to run the machinery of his own mill, and such machinery must be reasonably adapted to the size of the stream: *Timm v. Bear*, 29 Wis. 254; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526.

A few illustrations may be given to indicate what has been considered a reasonable use for which the waters of a stream may be impeded or detained. Thus, it has been held that the owner of a mill may detain the waters of a stream long enough to fill a reservoir for the use of his mill, if the reservoir is of a size reasonably consistent with the volume of the stream, and is not liable unless he detains the water unreasonably: *Coldwell v. Sanderson*, 60 Wis. 52, 28 N. W. 232. No liability was held to attach in *Bullard v. Saratoga etc. Mfg. Co.*, 77 N. Y. 525, although a lower riparian owner's paper-mill was injured thereby. In this case it appeared that, to conduct the paper-mill successfully, it was necessary to run it continuously, day and night, and the defendant's detention of the water rendered this impossible. The fact that the lower mill is an ancient one is immaterial: *Gould v. Boston Duck Co.*, 13 Gray, 442; *Pitts v. Lancaster Mills*, 13 Met. 156. The withdrawing of a stream for several days to flood a cranberry meadow was held to be reasonable in *Hinckley v. Nickerson*, 117 Mass. 213. The waters of a stream may be dammed for a fish-pond: *Wood v. Edes*, 2 Allen, 580; and also for the purpose of cutting and removing ice from a pond formed thereby: *De Bann v. Bean*, 29 Hun, 236; *Gehlen v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 416, 70 N. W. 757. But where no use whatever is made of a pond, the detention of a stream to fill it is unlawful: *Weare v. Chase*, 93 Me. 264, 44 Atl. 900. So, also, is any wanton, malicious, vexatious, or unnecessary detention of a stream: *Phillips v. Sherman*, 64 Me. 171; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *Twiss v. Baldwin*, 9 Conn. 291; *Clapp v. Herrick*, 129 Mass. 292. And one has no right to erect machinery requiring for its operation more water than the stream ordinarily furnishes, and operate such machinery by ponds full, discharging upon those below in unusual quantities, so that lower owners are unable to use it: *Clinton v. Myera*, 46 N. Y. 511, 7 Am. Rep. 373.

c. **By Other Means.**—Culverts over small streams are treated the same as bridges of any kind, and must be built of sufficient capacity to allow all the usual amount of water to safely pass through them, including ordinary freshets which may reasonably be expected: *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, 9 S. E. 139; *Knight v. Albemarle etc. R. R. Co.*, 111 N. C. 80, 15 S. E. 929. And a failure to construct proper culverts will subject the person to liability for any resulting injury: *Carriger v. Railroad Co.*, 7 Lea, 388; *Van Orsdol v. Railroad Co.*, 56 Iowa, 470, 9 N. W. 379. A person or corporation, however, need provide only for ordinary high water and floods which may reasonably be expected to occur. The culverts need not be large enough to carry away the water of extraordinary floods: *Fick v. Pennsylvania R. R.*, 157 Pa. St. 622, 27 Atl. 783; *Treichel v. Great*

Northern Ry. Co., 80 Minn. 96, 82 N. W. 1110; Emery v. Raleigh etc. R. R. Co., 102 N. C. 209, 11 Am. St. Rep. 727, 9 S. E. 139. A river or stream cannot be dammed by a log jam or by a river boom, so that the waters will overflow to the injury of other riparian owners: Alabama Lumber Co. v. Keel, 125 Ala. 603, 82 Am. St. Rep. 265, 28 South. 204; Rogers v. Coal River Boom etc. Co., 41 W. Va. 593, 23 S. E. 919; Baumgartner v. Sturgeon River Boom Co., 120 Mich. 321, 79 N. W. 566. The owner of the logs will be liable, though the overflow was occasioned by a flood, if the high water might reasonably be expected to occur, even at intervals of a few years: McKenzie v. Mississippi etc. Boom Co., 29 Minn. 288. It is immaterial whether the log jam and consequent overflow was caused by negligence or not: Baumgartner v. Sturgeon River Boom Co., 120 Mich. 321, 79 N. W. 566. In Alabama Lumber Co. v. Keel, 125 Ala. 603, 82 Am. St. Rep. 265, 28 South. 204, the defendants were held liable, though they had a right to construct and use the cross-boom, and it was properly constructed, and though they exercised all care and diligence to prevent the formation of the jam and to relieve it after it was formed. The wrong consisted in floating the logs down stream in such numbers and masses as to make the jam and cause the damages complained of. It is unlawful to so obstruct a stream with logs that water will not flow down to a lower mill owner, who is thereby prevented from running his mill: Wooden v. Mt. Pleasant Lumber etc. Co., 106 Mich. 412, 64 N. W. 329. In this case the logs dammed the stream in winter and obstructed the natural flow for months.

The obstruction of a stream by marble works was held unlawful, and subjected the owner to liability for an overflow occasioned thereby, in Ames v. Dorset Marble Co., 64 Vt. 10, 23 Atl. 857. And a city obstructing a natural watercourse by grading was held liable therefor in Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41.

II. Diminishing or Impeding the Flow of Surface Water.

a. **Water Flowing onto One's Land.**—In the courts of this country, two well-defined and practically diametrically opposite rules prevail respecting the right of a land owner to obstruct the flow of surface water on to his land from that of another. These are the common-law rule, holding that a land owner may completely obstruct surface water which would naturally flow from higher land to his own; the other is the rule of the civil law, mistakenly supposed to be the common-law rule in some of the decisions, which holds that higher land has an easement over lower land for surface water which naturally flows from the one to the other. The courts of the various states are quite equally divided between these two rules, while a few states have seemingly adopted a sort of modified rule.

1. **Common-law Rule.**—At the common law, surface water was deemed to be the common enemy of all, and hence a land owner was under no obligation to allow it to flow on or across his land from the land of a higher neighbor, but had the absolute right to shut it out from all access to his land, and no liability attached for any injury which might result therefrom to another's land. This rule prevails in Connecticut: *Chadeayne v. Robinson*, 55 Conn. 345, 8 Am. St. Rep. 55, 11 Atl. 592; *Grant v. Allen*, 41 Conn. 156; though *Adams v. Walker*, 34 Conn. 466, 91 Am. Dec. 742, might seem to announce a different rule. In Indiana: *Taylor v. Fickas*, 64 Ind. 167, 81 Am. Rep. 114; *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Benthall v. Selfert*, 77 Ind. 302; *Cairo etc. R. R. Co. v. Howry*, 77 Ind. 364; *Hill v. Cincinnati etc. Ry. Co.*, 109 Ind. 511, 10 N. E. 410. In Kansas: *Atchison etc. R. R. Co. v. Hammer*, 22 Kan. 763, 81 Am. Rep. 216; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Kansas City etc. R. R. Co. v. Riley*, 33 Kan. 374, 6 Pac. 581. In Maine: *Bangor v. Lansil*, 51 Me. 521; *Morrison v. Bucksport etc. R. R. Co.*, 67 Me. 353; *Murphy v. Kelley*, 68 Me. 521. In Massachusetts: *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625, a leading authority on this entire subject; *Franklin v. Fisk*, 13 Allen, 211, 90 Am. Dec. 194; *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *Bates v. Smith*, 100 Mass. 181; *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174, 5 N. E. 142. In Minnesota: *O'Brien v. St. Paul*, 25 Minn. 333, 33 Am. Rep. 470; *Jordan v. St. Paul etc. Ry. Co.*, 42 Minn. 172, 43 N. W. 849; *Rowe v. St. Paul etc. Ry. Co.*, 41 Minn. 384, 16 Am. St. Rep. 706, 43 N. W. 76. In Missouri: *Goettenetroeter v. Kappleman*, 83 Mo. App. 290; *Stewart v. Clinton*, 79 Mo. 603; *Jones v. St. Louis etc. Ry. Co.*, 84 Mo. 151; *St. Louis etc. Ry. Co. v. Schneider*, 80 Mo. App. 620; *Abbott v. Kansas City etc. R. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581. Though in some earlier cases there is a manifest tendency to adopt the civil-law rule: *McCormick v. Kansas City etc. R. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431; *Shane v. Kansas City etc. R. R. Co.*, 71 Mo. 237, 36 Am. Rep. 480. These cases were, however, expressly overruled in *Abbott v. Kansas City etc. R. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581. In Nebraska: *Lincoln etc. R. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859; *Town v. Missouri Pac. Ry. Co.*, 50 Neb. 768, 70 N. W. 402. In New Hampshire: *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. In New Jersey: *Bowlsby v. Speer*, 31 N. J. L. 351, 86 Am. Dec. 216; *Union v. Durkesy*, 38 N. J. L. 21; *Kelly v. Dunning*, 39 N. J. Eq. 482. Though in *Lord v. Carbon Iron Mfg. Co.*, 42 N. J. Eq. 157, 6 Atl. 812, the vice-chancellor said that land on a lower level was under a natural servitude to that located above it to receive the water flowing down to it naturally. Whatever the language of this case may mean, the court cites no New Jersey cases to support its decision, and *Bowlsby v. Speer*, 31 N. J. L. 351, 86

Am. Dec. 216, seems never to have been overruled. In New Mexico, the legislature having adopted the common law as the rule of practice and decision, the United States supreme court held that the common-law doctrine relative to the rights of land owners as to the flow of surface water should be applied in preference to the civil-law rules: *Walker v. New Mexico etc. R. R. Co.*, 165 U. S. 593, 17 Sup. Ct. Rep. 821. In New York: *Goodale v. Tuttle*, 29 N. Y. 459; *Gould v. Booth*, 66 N. Y. 62; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519. In South Carolina: *Baltzeger v. Railway*, 54 S. C. 242, 71 Am. St. Rep. 789, 32 S. E. 358. In Texas: *Gross v. Lampass*, 74 Tex. 195, 11 S. W. 1086. Though a different rule has been established in this state by statute, as applied to railroads: *Gulf etc. Ry. Co. v. Helsley*, 62 Tex. 593; *Rosenthal v. Taylor etc. Ry. Co.*, 79 Tex. 325, 15 S. W. 268; *Austin etc. Ry. Co. v. Anderson*, 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484. In Vermont: *Harwood v. Benton*, 82 Vt. 724. In Virginia, a modified common-law rule prevails: *Norfolk etc. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517. In Wisconsin: *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Pettigrew v. Evansville*, 25 Wis. 223, 8 Am. Rep. 50; *O'Connor v. Fond Du Lac etc. Ry. Co.*, 52 Wis. 526, 38 Am. Rep. 754, 9 N. W. 287; *Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715, 22 N. W. 284; *Borchsenius v. Chicago etc. Ry. Co.*, 96 Wis. 448, 71 N. W. 884. And in Washington: *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 13.

The common-law rule was well stated by Justice Brewer in *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241: "The ordinary rule concerning surface water is settled and familiar; the lower estate owes no duty to the higher, and the owner of each may use or abandon surface water as he pleases. It is not one of the legal rights appertaining to land that the water falling upon it from the clouds shall be discharged over land contiguous to it; and this is the law, no matter what the conformation of the face of the country may be, and altogether without reference to the fact that in the natural condition of things, the surface water would escape in any given direction; the consequence is, therefore, that there is no such thing known to the law as a right to any particular flow of surface water *jure naturae*. The owner of land may, at his pleasure, withhold the water falling on his property from passing onto that of his neighbors, and in the same manner may prevent the water falling on the land of the latter from coming upon his own. In a word, neither the right to discharge nor to receive surface water can have any legal existence, except from a grant, express or implied. The wisdom of this doctrine will be apparent to all minds on a little reflection. If the right to run in its natural channels was annexed to surface water as a legal incident, the difficulties would be infinite, indeed. Unless the land should be left idle, it would be impossible

to enforce the right in its rigor; for it is obvious every house that is built and every furrow that is made in a field is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a watershed, and most low ground become reservoirs. It is certain that any other doctrine but that which the law has adopted would be altogether impracticable." We shall notice later that as forceful language is used to sustain the civil-law rule. The rule as stated in *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625, and expressly adopted in *Taylor v. Fickas*, 67 Ind. 167, 31 Am. Rep. 114, is that "the right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass onto and over the same in greater quantities or in other directions than they were accustomed to flow. . . . The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil."

Naturally the rules adopted with reference to the obstruction of surface water have no application to watercourses: See *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114, and cases cited.

A railroad company has usually the same rights as any other land owner, and may obstruct the flow of mere surface water by its embankments, and need not provide culverts through them: *Calve etc. R. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Hill v. Cincinnati etc. Ry. Co.*, 109 Ind. 511, 10 N. E. 410; *Atchison etc. R. R. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 216; *Morrison v. Buckport etc. R. R. Co.*, 67 Me. 353; *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174, 5 N. E. 142; *Jordan v. St. Paul etc. Ry. Co.*, 42 Minn. 172, 43 N. W. 849; *Rowe v. St. Paul etc. Ry. Co.*, 41 Minn. 384, 16 Am. St. Rep. 706, 43 S. W. 76; *O'Connor v. Fond Du Lac etc. Ry. Co.*, 52 Wis. 526, 38 Am. Rep. 753, 9 N. W. 287. This is certainly true in the absence of negligence in the construction of the road-bed: *Abbott v. Kansas City etc. R. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581.

Ordinarily, a city has the same right over the land it owns as any other owner, and will be liable for obstructing the flow of surface water only when private owners would be subject to a similar liability: *O'Brien v. St. Paul*, 25 Minn. 333, 33 Am. Rep. 470; *Lee v. Minneapolis*, 22 Minn. 13; *Alden v. Minneapolis*, 24 Minn.

254; *Flagg v. Worcester*, 13 Gray, 601; *Stewart v. Clinton*, 79 Mo. 603; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473.

Barkeley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519, admits that there may be cases which, owing to special conditions and circumstances, should be exceptions to the general common-law rule. An exception has been noted in some of the cases, that in hilly regions, where from the natural formation of the surface of the ground, large quantities of water are, at times, forced to seek a channel through gorges or narrow valleys, a land owner cannot obstruct such a flow, for such a channel is deemed to be in the nature of a watercourse: *Palmer v. Waddell*, 22 Kan. 352; *Bowlsby v. Speer*, 81 N. J. L. 351, 86 Am. Dec. 216; *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767.

The fact that a natural watercourse spreads out over the surface of the ground and ceases to flow between defined banks does not make it surface water which can be obstructed, especially where at a point lower down it begins to flow again in a defined channel: *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349.

But the right to obstruct surface water in the use and improvement of one's land, so that it is turned back upon the land of another, seems not to be modified by the mere existence of depressions in which surface drainage occurs during times of freshet, unless on account of the hilly nature of the country these depressions are really channels in the nature of a watercourse at the time of heavy rains or melting snows: *Rowe v. St. Paul etc. Ry. Co.*, 41 Minn. 384, 16 Am. St. Rep. 706, 43 N. W. 76. In recognizing such a situation as an exception to the general rule, the court, in *Town v. Missouri Pac. Ry. Co.*, 50 Neb. 768, 70 N. W. 402, said that there were no exceptions to the general rule except from necessity, but that such necessity existed in a case like this.

In *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276, the right of a land owner to obstruct the flow of surface water was said to be limited to what is necessary in the reasonable use of his own land. And see *Norfolk etc. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517. If this decision intends to hold that mere surface water flowing from higher to lower land cannot be obstructed by the lower land owner, unless it is necessary in the reasonable use of his own land, we doubt whether this is the common-law rule. Surface water was recognized as a common enemy, at common law, which anyone might fight off and prevent from coming upon his own land. "A proprietor of land," said the court in *Bates v. Smith*, 100 Mass. 181, "may erect structures upon it as solid and as high as he pleases, without regard to their effect upon surface water which would otherwise come from adjoining lands upon his soil." This, we believe, is the correct common-law rule. And the doctrine of reasonable use is limited in its application to water which collects on one's own land and which is diverted to the land of another; See *Borch-*

senius v. Chicago etc. Ry. Co., 96 Wis. 448, 80 N. W. 1123, and the subsequent discussion in this note under division IV, a.

Town v. Missouri Pac. Ry. Co., 50 Neb. 768, 70 N. W. 402, seems to hold that if a land owner obstructs surface water by an embankment, which through negligence causes injury to another, he would be liable on the ground of negligence. This would clearly be true if the embankment was so made that water was accumulated on one's own land in such quantity that the embankment was not able to hold it, and broke, causing damage: Borchsenius v. Chicago etc. Ry. Co., 96 Wis. 448, 80 N. W. 1123.

There is still another exception to the rule that a land owner may fight off and obstruct surface water as he sees fit, and this is that he cannot so obstruct it that its accumulation will become a nuisance per se. But this is more particularly true where the water is accumulated on one's own land: Baltzger v. Railway, 54 S. C. 242, 71 Am. St. Rep. 789, 32 S. E. 358.

2. **Civil-law Rule.**—Under the doctrine of the civil law, lower land is subject to the servitude of receiving the natural flow of surface water from higher and adjoining land. It is, therefore, held that the owner of lower land cannot obstruct the drainage of surface water naturally flowing thereon from higher ground. This rule, outside of Louisiana, seems to have been first adopted in Pennsylvania, and at the present time is followed in very many of the states. It is the rule in Alabama: Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Crabtree v. Baker, 75 Ala. 91, 51 Am. Rep. 424; Farris v. Dudley, 78 Ala. 124, 56 Am. Rep. 24. In California: Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; McDaniel v. Cummings, 83 Cal. 515, 27 Pac. 795; Hicks v. Drew, 117 Cal. 305, 49 Pac. 189; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572. In Georgia: Goldsmith v. Elias etc. Co., 53 Ga. 186. In Illinois: Gilham v. Madison County R. R. Co., 49 Ill. 484, 95 Am. Dec. 627; Peck v. Harrington, 109 Ill. 611, 50 Am. Rep. 627; Gormley v. Sanford, 52 Ill. 158; Groff v. Aukerbrandt, 124 Ill. 51, 7 Am. St. Rep. 342, 15 N. E. 40; Young v. Commissioners, 134 Ill. 569, 23 N. E. 689; Helm v. Richmond, 72 Ill. App. 516. In Kentucky, the courts seem, in effect, to have adopted the rule of the civil law: Grinstead v. Sanders, 22 Ky. Law Rep. 51, 56 S. W. 665; Kemper v. Louisville, 14 Bush, 87; Hahn v. Thornberry, 7 Bush, 403. In Louisiana, the civil law generally prevails; Martin v. Jett, 12 La. 501, 32 Am. Dec. 120; Lattimore v. Davis, 14 La. 161, 33 Am. Dec. 581; Delahoussaye v. Judice, 13 La. Ann. 587, 71 Am. Dec. 521; Hooper v. Wilkinson, 15 La. Ann. 497, 77 Am. Dec. 194; Barrow v. Landry, 15 La. Ann. 681, 77 Am. Dec. 199. In Maryland: Philadelphia etc. R. R. Co. v. Davis, 68 Md. 281, 6 Am. St. Rep. 440, 11 Atl. 822. In Michigan: Boyd v. Conklin, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595; Rice v. Flint, 67 Mich.

401, 34 N. W. 719; *Osten v. Jerome*, 93 Mich. 196, 53 N. W. 7; *Leldlein v. Meyer*, 95 Mich. 589, 55 N. W. 367; *Finkbinder v. Ernst*, 126 Mich. 565, 85 N. W. 1127. In Nevada: *Boynton v. Longley*, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437. In North Carolina, as intimated by the principal case, the civil law prevails: *Porter v. Durham*, 74 N. C. 767; *Overton v. Sawyer*, 1 Jones, 808, 62 Am. Dec. 170. In Ohio: *Butler v. Peck*, 16 Ohio St. 335, 88 Am. Dec. 452; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429. In Pennsylvania: *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437; *Martin v. Ridde*, 26 Pa. St. 415; *Hays v. Hinkleman*, 68 Pa. St. 324; *Glass v. Fritz*, 148 Pa. St. 324, 23 Atl. 1050; *Meixell v. Morgan*, 149 Pa. St. 415, 84 Am. St. Rep. 614, 24 Atl. 216. In Tennessee: *Louisville etc. R. R. Co. v. Hays*, 11 Lea, 382, 47 Am. Rep. 291; *Carriger v. East Tennessee etc. R. R. Co.*, 7 Lea, 388; *Garland v. Aurin*, 103 Tenn. 555, 76 Am. St. Rep. 699, 53 S. W. 940.

In *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437, perhaps the earliest case to adopt the civil-law rule, it was said that "almost the whole law of watercourses is founded on the maxim of the common law, '*Aqua currit et debet currere.*' Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters, which by nature rise in or flow or fall upon the superior. This easement is called a servitude in the Roman law, and consists in the subjection of the inferior heritage toward those whose lands are more elevated to receive the waters which flow from them naturally." In *Martin v. Riddle*, 26 Pa. St. 415, quoted from in *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412, it is said: "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances; hence the owner of the lower ground has no right to erect embankments, whereby the natural flow of the water from the upper ground shall be stopped."

In some of the cases, as, for example, *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 218, the court seems not to have been awake to the fact that it was adopting the civil-law rule. After quoting the rule laid down in this case, the court, in *McDaniel v. Cummings*, 83 Cal. 515, 27 Pac. 795, observed that this was intended as a statement of the common-law rule, "for otherwise it could not have been the law of this state," but affirms the case upon the principle of *stare decisis*. If the lower owner raises an embankment to shut off the natural drainage of surface water, the upper owner has a right to remove it: *Overton v. Sawyer*, 1 Jones, 308, 62 Am. Dec. 170. An upper owner whose easement has been infringed by the erection of an embankment may maintain an action without showing any

actual damage: *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732. The mere act of flooding an upper owner's land is wrongful per se, although it may actually have caused benefit instead of injury: *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732.

This easement of drainage applies only to surface water which naturally flows over lower lands. Hence an upper owner has no right to divert the natural drainage of his land so as to make it flow in a different direction from that it was accustomed to flow: *Hays v. Hinkleman*, 68 Pa. St. 324.

It would seem that an upper land owner had no right to divert the natural flow of surface water even by ordinary husbandry: *Finkbinder v. Ernst*, 128 Mich. 565, 85 N. W. 1127. This natural easement arises out of the relative altitudes of adjacent lands, and these altitudes cannot be artificially changed to the damage of an adjacent owner: *Butler v. Peck*, 16 Ohio St. 335, 88 Am. Dec. 452. The servitude cannot be made more burdensome by the act of man: *Boynton v. Longley*, 19 Nev. 69, 8 Am. St. Rep. 781, 6 Pac. 437. See, further, division IV of this note.

The upper owner must have a right to drain over the land of another or the surface water may be lawfully obstructed: *Throop v. Griffin*, 77 Ill. App. 505; *Schmitz v. Ort*, 92 Ill. App. 407. Hence, if he collects the water in greatly increased quantity for discharge over his neighbor's land, the latter may obstruct it by an embankment: *Mayor v. Pate* (Tenn.), 59 S. W. 480. For, as will subsequently be seen, an upper owner has no right to collect the surface water on his land, and throw it in large quantities on the land of a lower owner. And see *Grinstead v. Sanders*, 22 Ky. Law Rep. 51, 56 S. W. 665.

That the owner of lower land must permit surface water from higher land to flow unobstructed over his land does not apply to the overflow of rivers, and embankments may be erected to prevent overflow therefrom: *Lamb v. Reclamation Dist.*, 78 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429. Hence, if a land owner next to a river fails to construct a levee to protect himself from flood water, the owner of lower land in the rear of him may construct an embankment to protect his own land, even though the higher land near the river is overflowed in consequence: *McDaniel v. Cummings*, 88 Cal. 515, 27 Pac. 795. But this exception applies only where the owners of higher land along the river refuse or neglect to construct levees, and where a levee has actually been built next to the river, water which, by reason of continued floods, seeps through, is real surface water, against which a lower owner cannot raise an embankment to prevent it from naturally draining over his land: *Gray v. McWilliams*, 98 Cal. 157, 85 Am. St. Rep. 163, 32 Pac. 976.

Where water has for a number of years flowed through a certain channel, and washes out a large ditch, so that it becomes practically impossible to ascertain where the original surface was, a land owner cannot fill up the ditch on the assumption that the water will thereafter flow as it did in a state of nature, if the result is to throw it back upon the upper owner: *Ribordy v. Murray*, 70 Ill. App. 527.

Railroads are subject to the same rule as other owners of property, and it is their duty to provide culverts or other means for the safe passage of surface water through embankments which they may construct: *Carriger v. East Tenn. etc. R. R. Co.*, 7 Lea, 388; *Louisville etc. R. R. Co. v. Hays*, 11 Lea, 382, 47 Am. Rep. 291; *Shahan v. Alabama etc. R. R. Co.*, 115 Ala. 181, 67 Am. St. Rep. 20, 22 South. 449; *Central of Ga. Ry. Co. v. Windham*, 126 Ala. 552, 28 South. 392; *Ohio etc. Ry. Co. v. Long*, 52 Ill. App. 670. A city is, in general, under the same obligation not to obstruct the natural flow of surface water by embankments: *Rice v. Flint*, 67 Mich. 401, 84 N. W. 719.

There appears to be some diversity of opinion whether the civil-law rule is applicable to city lots or not. In some of the cases it seems to be assumed that such an exception exists, so that the owner of a city lot may improve it or build on it as he sees fit, regardless of whether he obstructs or diverts surface water or not: *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595. In *Phillips v. Waterhouse*, 69 Iowa, 199, 58 Am. Rep. 220, 28 N. W. 539, it was directly held that the owner of a city lot could so improve his land as to turn rain from it into the adjacent street. The necessities of the case in *Waverly v. Page*, 105 Iowa, 225, 74 N. W. 988, were such as to induce the court to deny the right to obstruct water even in a city. But the flow in this case seems to have been in the nature of a watercourse and to be treated as such, for in other Iowa cases the right to improve a lot and so prevent surface water from flowing over it is clearly recognized: See *Cedar Falls v. Hansen*, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585. That the civil-law rule should be applied to city lots was, however, directly sanctioned in *Goldsmith v. Elsas etc. Co.*, 53 Ga. 186, and in the recent case of *Garland v. Aurin*, 103 Tenn. 555, 76 Am. St. Rep. 699, 53 S. W. 940, where the question is fully discussed, and the authorities collected; and the same rule was applied to lots located in a very thinly settled portion of a city, in *Gormley v. Sanford*, 52 Ill. 158. So that the weight of authority doubtless sustains the rule that the civil-law doctrine is applicable to city lots, though there appears to us to be more cogent reasons for engrafting an exception upon the rule in such a case: See the discussion by Justice Campbell, in *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595.

3. **Modified Rule.**—A sort of modified doctrine seems to prevail in a few states. For example, in Arkansas, the courts decline to adopt either the common-law or the civil-law rule in its entirety, but look rather to the good faith and reasonableness of the act, and hold that surface water may be fended off if it is done reasonably, for proper objects, and with due care with reference to the adjoining property. But no right exists to obstruct its natural flow arbitrarily, wantonly, or unreasonably: *Little Rock etc. Ry. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280. Similarly, in Mississippi, where the common-law rule is apparently favored, it is qualified by the maxim that one must so use his own as to not unnecessarily injure others. Hence, it was held that a railroad in building its roadbed must not obstruct the natural flow of surface water, if this could be avoided by a trestle, as safe, convenient, and inexpensive as an embankment: *Sinai v. Louisville etc. Ry. Co.*, 71 Miss. 547, 14 South. 87. The reasonableness of the use and the obstruction are inquired into in these cases, and every case depends largely upon its own circumstances: *Yazoo etc. R. R. Co. v. Davis*, 73 Miss. 678, 55 Am. St. Rep. 562, 19 South. 487. And in Virginia, the common-law rule prevails with the modification that the right to fight off surface water may not be exercised wantonly, unnecessarily, or carelessly. As was said in *Norfolk etc. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517: "It must be a reasonable use of the land for its improvement or better enjoyment, and the right must be exercised in good faith, with no purpose to abridge or interfere with the rights of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict any injury beyond what is necessary."

In Iowa, it seems doubtful just what rule prevails. *Wharton v. Stevens*, 84 Iowa, 107, 35 Am. St. Rep. 296, 50 S. W. 562, is a recent case, in which the civil-law rule seems to be favored, but the facts in this case show that the water was accustomed to flow in what seems to have been a natural watercourse, or, at least, drainage channel, and it cannot, therefore, be said that the civil law is the clear doctrine of this case. If an upper owner diverts water upon the land of a lower owner, which does not naturally flow there, the lower owner may obstruct it so that it will flow back upon the land of the upper owner: *Preston v. Hull*, 77 Iowa, 309, 42 N. W. 305. The decision in *Willits v. Chicago etc. Ry. Co.*, 88 Iowa, 281, 55 N. W. 313, expressly declares that neither the civil nor the common-law rule has been adopted in Iowa, in its entirety, and the court held that the rule in that state with reference to the right of interference with the natural flow of surface water is, that while every man may improve his own land as he pleases, he must do so in a careful and prudent manner, so as to occasion no unnecessary inconvenience or damage to his neighbor. To the same effect, see

Sullens v. Chicago etc. Ry. Co., 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545.

b. **Water Flowing Off of One's Land.**—The rule appears to be universal, that so far as concerns the right to obstruct surface water which otherwise would naturally flow off of one's land, the land owner may do with it as he pleases, so long as it remains on his land, and may appropriate all of it to his own use: **Town v. Missouri Pac. Ry. Co.** 50 Neb. 768, 70 N. W. 402; **Gibbs v. Williams**, 25 Kan. 214, 37 Am. Rep. 241; **Gannon v. Hargadon**, 10 Allen, 106, 87 Am. Dec. 625; **Taylor v. Fickas**, 64 Ind. 167, 31 Am. Rep. 114; **Green v. Carotta**, 72 Cal. 267, 13 Pac. 685.

III. Accelerating or Increasing the Flow of Streams.

The right to reasonably use a stream includes the right to discharge water into it so as to increase or accelerate its flow in order to beneficially employ it. Hence a mill owner may accumulate water in a reservoir, and in seasons of drought discharge it into the stream for the use of his mill, though the stream is necessarily affected by increasing its volume and accelerating its flow: **Drake v. Hamilton Woolen Co.**, 99 Mass. 574. But the use must be reasonable, so as not to cause unnecessary annoyance or injury to a lower owner: **Hayes v. Waldron**, 44 N. H. 580, 84 Am. Dec. 105. If a land owner turns into a stream the waters of another stream which do not naturally flow there, and the increased flow causes damage, he may be held liable therefor. And it seems that a lower owner would be entitled to nominal damages, without proof of special damage, because his right to have the stream flow in its accustomed quantity had been infringed, and the upper owner's right to an increased flow might ripen into an easement merely by continued user: **Tillotson v. Smith**, 32 N. H. 90, 64 Am. Dec. 355; **Merritt v. Parker**, 1 N. J. L. 460. In such a case it is no defense that the lower owner has been benefited by an increase in the flow of water due to diverting one stream into another: **East Jersey Water Co. v. Bigelow**, 60 N. J. L. 201, 38 Atl. 631. In **Grant v. Kugler**, 81 Ga. 637, 12 Am. St. Rep. 348, 8 S. E. 878, where the flow of a stream was greatly accelerated by the removal of a ledge of rock from the bed of the stream, liability was held to attach, but the broad proposition apparently laid down in this case by Chief Justice Bleckley, is not universally true—namely, that “the owner of water has no more right artificially to project it forward on another man's land, than he has to push it back upon land in his rear.” This question depends upon the reasonableness of the use which causes the increased or accelerated flow. An owner may dam up a stream, and then let it out in increased volume, if the capacity of the stream is not exceeded, and the purpose of so using the water is a reasonable one. He cannot let it out in unreasonable quantities: **Oregon Iron Co. v. Trullenger**, 3 Or. 1. Neither can he will-

fully accumulate a large head of water and then let it go for the purpose of injuring a lower owner: *Kelly v. Lett*, 18 Ired. 50; *Hogwood v. Edwards*, Phill. (N. C.) 350; *McKee v. Delaware etc. Canal Co.*, 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305. The law condemns any wanton use and disregard of the rights of others: *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813. A riparian owner has no right to retain by means of a dam the waters of a stream running through his land, and then to discharge them in such quantities into such stream that it is insufficient to carry them, and they overflow the lands of a lower owner to his injury. Such flooding of lands cannot be a reasonable use: *McKee v. Delaware etc. Canal Co.*, 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305; *Gerrish v. New Market etc. Co.*, 30 N. H. 478.

In damming up the waters of a stream, the one who constructs a dam must use proper care and diligence not to injure those below by the escape of water: *Lapham v. Curtis*, 5 Vt. 371, 26 Am. Dec. 310. The dam must be so built that it will withstand ordinary floods, and, even such excessive freshets as occasionally occur, or may be reasonably anticipated: *Mayor v. Bailey*, 2 Denio, 433; *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61. If the dam is built with due care, and sufficient to withstand such ordinary, or even great, floods, as may be expected to occur, the owner is not liable if his dam is broken, and excessive quantities of water are cast upon lower owners. He is free from negligence, and it seems that negligence in such a case is the only ground upon which liability can be predicated: See *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413; *Wolf v. St. Louis etc. Water Co.*, 10 Cal. 541; *Everett v. Hydraulic etc. Co.*, 23 Cal. 225; *Rich v. Keshena Imp. Co.*, 56 Wis. 287, 14 N. W. 191; *McKee v. Delaware etc. Canal Co.*, 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305.

The increasing or accelerating the flow of a stream, by discharging surface water into it will be discussed under the next heading.

IV. Accelerating or Increasing the Flow of Surface Water.

a. Ordinary Drainage Over Another's Land.—Under both the civil and the common law, water which naturally flows from higher to lower land may continue to do so without subjecting the upper owner to any liability therefor: See, by way of illustration, *Rudel v. Los Angeles County*, 118 Cal. 281, 50 Pac. 400; *Livesey v. Schmidt*, 96 Ky. 441, 29 S. W. 25; *Morrill v. Hurley*, 120 Mass. 99; *Rathke v. Gardner*, 134 Mass. 14; *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Borchsenius v. Chicago etc. Ry. Co.*, 96 Wis. 448, 71 N. W. 884. It has been said that both the civil and common law rules are alike in this respect, that they recognize the right of a land owner to expel surface water from his

land: *Whitney v. Willamette Ry. Co.*, 23 Or. 188, 31 Pac. 472. And this is true, so far as the general right itself is concerned, and, indeed, so far as relates to its exercise, with this exception, that under the common law surface water is considered a natural enemy, and may be turned off of one's land in any direction, while under the civil law the lower land is under a servitude to receive the water which naturally flows there, but no other: See *Mayor v. Sikes*, 94 Ga. 80, 47 Am. St. Rep. 132, 20 S. E. 257. Hence, under the civil-law rule a land owner cannot turn water upon adjoining land which does not naturally flow there, and would not otherwise have flowed in that direction: *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147. And the question whether the flow is merely increased or whether it is made to flow in a different direction is one of fact for the jury: *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147. The natural drainage cannot be altered so as to make the water flow in a different direction: *Holmes v. Calhoun County*, 97 Iowa, 360, 66 N. W. 145; *Crossville v. Stuart*, 77 Ill. App. 518. And the fact that a small portion of water in times of flood flows in a certain direction will not justify a land owner in turning all the water in the same channel: *Rudel v. Los Angeles County*, 118 Cal. 281, 50 Pac. 400.

On the other hand, under the common-law rule, a land owner may by improvement of his land turn the surface water onto another's land, and any changes which thereby take place in the natural drainage of the water are immaterial: *Rowe v. St. Paul etc. Ry. Co.*, 41 Minn. 384, 16 Am. St. Rep. 706, 43 N. W. 76; *O'Brien v. St. Paul*, 25 Minn. 470, 33 Am. Rep. 470. Water may be drained over land on which it would otherwise not go: *Jordan v. St. Paul etc. Ry. Co.*, 42 Minn. 172, 43 N. W. 849; *Clauson v. Chicago etc. Ry. Co.*, 106 Wis. 308, 82 N. W. 146; *Gannon v. Hargadon*, 10 Allen, 106, 67 Am. Dec. 625. With this difference, therefore, as to the right to divert surface water, and make it flow in a direction it otherwise would not go, the two rules are in effect the same as applied by the various courts in this country, concerning the right to accelerate or increase the flow of surface water from higher to lower land.

Under the strict civil-law rule, it is probable that an upper owner can do nothing whereby the natural servitude due by the lower estate is rendered more burdensome: See Code, art. 666. And in *Boynton v. Longley*, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437, it was said that the servitude of the lower land owner could not be augmented or made more burdensome by the acts or industry of man. And in *Drake v. Chicago etc. Ry. Co.*, 70 Iowa, 59, 29 N. W. 804, commenting on the rule of the common law, the court held that the improvement of one's land must not have the effect to increase the quantity of water which is precipitated on the land of another. Obviously, such a narrow construction of the right to drain and improve one's land would prevent all improvement and cultivation,

and has not been adopted in any state. In Louisiana, where the civil law, as a whole, prevails, the courts adopt a liberal construction in the interest of agriculture: *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120. *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437, in discussing the civil-law rule, said it must not be understood that "because the flow of water must not be caused by the act of man, that, therefore, the proprietor who transmits water to the inferior heritage is not permitted to do anything on his own land—that he is condemned to abandon it to perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law intends not this. . . . It neither would nor could refuse to the superior proprietor the right to aid and direct the natural flow. Hence, for the sake of agriculture, a man may drain his ground, which is too moist, and, discharging the water according to its natural channel, may cover up and conceal the drains through his lands, may use running streams to irrigate his fields, though he thereby diminishes, not unreasonably, the supply of his neighbor below, and may clear out impediments in the natural channel of the streams, though the flow of water upon his neighbor be thereby increased. . . . It is not more agreeable to the laws of nature that water should descend than it is that land should be farmed and mined; but in many cases they cannot be if an increased volume of water may not be discharged through natural channels and outlets. The principle, therefore, is to be maintained, but it should be prudently applied." And the Illinois supreme court, in applying the same doctrine, held that the owner of the dominant heritage had, and ought to have, the right by ditches and drains to drain his own land into the natural and usual channels which nature has provided, even if the quantity of water in that way thrown upon the next adjoining lower lands is thereby increased: *Anderson v. Henderson*, 124 Ill. 164, 16 N. E. 232.

The common-law doctrine does not differ from that stated above. A land owner may occupy and improve his land as he sees fit, although he thereby causes surface water to flow therefrom in larger quantities than previously: *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625. The general rule was well stated in *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50: "It is the duty of every owner of land, if he wishes to carry off surface water from his own land, to do so without material injury or detriment to the land of his neighbors, and, if he cannot, he must suffer the inconvenience arising from its presence, and cannot complain that others refuse to allow it passage over their lands. . . . Considerable latitude is left to the owners of estates as to the manner in which they will cultivate and improve them, and in so doing they may undoubtedly somewhat change the course and flow of the surface water, so as in a measure to increase the quantity which would

otherwise pass upon the lands of others. They may also fill up low and wet places, so as to render them arable, or fit for crops, thus causing the water which previously settled in them to spread and pass onto the lands of others, doing no perceptible injury thereto. But the extent to which any proprietor may go, in these and other ways, in turning the surface water of his own land off onto the lands of others, must, in each case, we think be determined by the degree of injury which it will produce. Very slight damage will not, perhaps, be regarded; but if the injury be immediate, and such as to perceptibly and materially impair the value or destroy the usefulness of the adjoining estate, we apprehend that the law will not permit it to be done." All artificial drainage is to a greater or less extent a diversion of surface water. And the right at common law to divert surface water, so far as it relates to the collection and discharge of such water from one's land, is not subject to the same rules as the diversion of a stream. The right to divert surface water depends upon the reasonableness and necessity therefor. If the necessity exists, and it is reasonably done, surface water may be collected into a drain and discharged upon the land of another: *Oftelle v. Hammond*, 78 Minn. 275, 80 N. W. 1123; *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. 462; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147. While under the civil-law rule water cannot be diverted and made to flow in an entirely different direction, so that it is cast upon land it would otherwise never reach, yet it may be diverted in the sense that it is collected in artificial drains, and cast upon the lower owner. And the right, both in common-law states and in those where the civil law prevails, to accelerate and increase the flow of surface water to the land of another, would seem to depend upon the reasonableness of the act, and the necessity therefor. The usual and reasonable cultivation and improvement of land is encouraged, though the flow of surface water over another's land is thereby increased: *Middlesex Co. v. McCue*, 149 Mass. 103, 14 Am. St. Rep. 102, 21 N. E. 230. What constitutes a reasonable use may frequently be a question of difficulty, and one upon which courts might reasonably differ upon the same state of facts. The Indiana courts seem to confine the rule within very narrow limits, holding, in *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139, that surface water on one's own land must be kept there or permitted to flow off without artificial interference. And the right to make drains was, in *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150, said to be "restricted to such as are required by good husbandry and the proper improvement of the surface of the ground, and as may be discharged into natural channels, without inflicting palpable and unnecessary injury on the lower field."

It may be doubtful whether an owner can collect water over a large field and drain it into one artificial channel, and cast it on his neighbor's land. But he certainly has a right to direct the

drainage of his land into ditches or underground drains, not changing the general place of discharge: *Martin v. Riddle*, 26 Pa. St. 415; *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120. Water which, by slow natural process will reach another's land, may be increased in its flow by means of ditches dug in the same direction, if done for some useful purpose, as in aid of agriculture: *Sowers v. Shift*, 15 La. Ann. 300. In cases of this character the attempt is made to do justice to both parties, instead of recognizing and applying any arbitrary rights of either: *Minor v. Wright*, 16 La. Ann. 151. In *Anderson v. Henderson*, 124 Ill. 164, 16 N. E. 232, it was held that an upper land owner had a right, by ditches and drains, to drain his own land into the natural and usual channels, which nature had provided, though the quantity of water thrown upon a lower owner was thereby increased. To the same effect, see *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437; *Young v. Commissioners*, 134 Ill. 569, 23 N. E. 689; *Vannest v. Fleming*, 79 Iowa, 638, 18 Am. St. Rep. 387, 44 N. W. 906; *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120; *Lattimore v. Davis*, 14 La. 161, 33 Am. Dec. 581; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Graham v. Keene*, 34 Ill. App. 87; *Rhoads v. Davidhelser*, 133 Pa. St. 226, 19 Am. St. Rep. 630, 19 Atl. 400. Where a particular point is the natural watershed of a tract of land, surface water may be directed to that point: *Meixell v. Morgan*, 149 Pa. St. 415, 34 Am. St. Rep. 614, 24 Atl. 216. In *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350, it was held proper for one who had erected a stone wall between his place and that of a lower owner to leave openings in the wall opposite ditches on his land for the discharge of surface water. A land owner may fill up sag holes and pools on his own land, in cultivating it: *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. 90; and for such purpose ditch and drain it as he sees fit, providing he does not injure a lower owner: *Osten v. Jerome*, 98 Mich. 196, 53 N. W. 7. But he cannot reclaim swamp land by constructing artificial ditches and discharging the water onto a lower owner, rendering his land wet and untillable, although such reclamation may have been an act of good husbandry: *Yerex v. Klineder*, 86 Mich. 24, 24 Am. St. Rep. 113, 48 N. W. 875; *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. 90; *Finkbinder v. Ernst*, 126 Mich. 565, 85 N. W. 1127.

b. **Discharging Surface Water in Large Quantities.**—The rule is universally recognized that a land owner has no right to collect surface water in an artificial channel, and discharge it in large quantities upon the land of a lower owner to his damage. Of this general proposition there is no doubt: See *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Springfield etc. Ry. Co. v. Henry*, 44 Ark. 360; *Durgin v. Neal*, 82 Cal. 595, 23 Pac. 133, 375; *Rudel v. Los Angeles County*,

118 Cal. 281, 50 Pac. 400; *Adams v. Walker*, 84 Conn. 466, 91 Am. Dec. 742; *Goldsmith v. Elsas*, 53 Ga. 186; *Mayor v. Sikes*, 94 Ga. 30, 47 Am. St. Rep. 132, 20 S. E. 257; *Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1; *Young v. Commissioners*, 134 Ill. 569, 23 N. E. 689; *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Davis v. Crawfordsville*, 119 Ind. 1, 12 Am. St. Rep. 361, 21 N. E. 449; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Vannest v. Fleming*, 79 Iowa, 638, 18 Am. St. Rep. 387, 44 N. W. 906; *Drake v. Chicago etc. Ry. Co.*, 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215; *Cedar Falls v. Hansen*, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585; *Miller v. Hayden*, 91 Ky. 215, 15 S. W. 243; *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120; *Lattimore v. Davis*, 14 La. 161, 33 Am. Dec. 581; *White v. Chapin*, 12 Allen, 516; *Curtis v. Eastern R. R. Co.*, 14 Allen, 55; *Rathke v. Gardner*, 134 Mass. 14; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Yerex v. Elneder*, 86 Mich. 24, 24 Am. St. Rep. 113, 48 N. W. 875; *Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671, 31 N. W. 863; *O'Brien v. St. Paul*, 25 Minn. 333, 33 Am. Rep. 470; *Beach v. Gaylord*, 43 Minn. 476, 45 N. W. 1095; *Follman v. Mankato*, 45 Minn. 457, 48 N. W. 192; *Hogenson v. St. Paul etc. Ry. Co.*, 31 Minn. 224, 17 N. W. 374; *Illinois Cent. R. R. Co. v. Miller*, 68 Miss. 760, 10 South. 61; *McCormick v. Kansas City etc. R. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431; *Rychlicki v. St. Louis*, 98 Mo. 497, 14 Am. St. Rep. 651, 11 S. W. 1001; *Fremont etc. R. R. Co. v. Morley*, 25 Neb. 138, 13 Am. St. Rep. 482, 40 N. W. 948; *Field v. West Orange*, 36 N. J. Eq. 118; *Soule v. Passaic*, 47 N. J. Eq. 28, 20 Atl. 346; *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Selfert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Jutte v. Hughes*, 67 N. Y. 267; *Butler v. Peck*, 16 Ohio St. 335, 88 Am. Dec. 452; *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Rhoads v. Davidheiser*, 133 Pa. St. 226, 19 Am. St. Rep. 630, 19 Atl. 400; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Mayor v. Pate (Tenn.)*, 59 S. W. 460; *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Borchsenius v. Chicago etc. Ry. Co.*, 96 Wis. 448, 71 N. W. 884; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50.

This is both the rule of the common and the civil law: See, particularly, *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519. Under neither rule can surface water be accumulated in artificial channels and cast in undue and unnatural quantities upon the land of another: *Illinois Cent. R. R. Co. v. Miller*, 68 Miss. 760, 10 South. 61. The common-law rule that surface water is a natural enemy which may be fought off and controlled by a land owner as he will has no application to water which falls or accumulates upon one's own land: *Borchsenius v. Chicago etc. Ry. Co.*, 96 Wis. 448, 71 N. W.

884. No right exists to collect water in artificial channels and discharge it on another's land, though it may be an act of good husbandry: *Yerex v. Eineder*, 86 Mich. 24, 24 Am. St. Rep. 113, 48 N. W. 875; *Finkbinder v. Ernest*, 126 Mich. 565, 85 N. W. 1127.

It is immaterial that the water was first discharged on the upper owner's land near the boundary line, and then allowed to flow of its own accord onto the lower owner's land, doing damage: *Beach v. Gaylord*, 43 Minn. 476, 45 N. W. 1095.

If one accumulates water in large quantities on his own land, so that it is discharged upon another's land and does damage, he is liable, irrespective of whether he was negligent or not: *Jutte v. Hughes*, 67 N. Y. 267; and see *Mairs v. Manhattan etc. Assn.*, 89 N. Y. 498.

Ordinarily, a land owner has no right to drain onto the land of another the waters from a pond or marsh, even though he may desire to do so for the honest and laudable purpose of reclaiming his land: See *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Kauffman v. Griesemer*, 26 Pa. St. 407, 68 Am. Dec. 437; *Butler v. Peck*, 16 Ohio St. 335, 88 Am. Dec. 452; *Schuster v. Albrecht*, 98 Wis. 241, 67 Am. St. Rep. 804, 73 N. W. 990; *Nicolai v. Wilkins*, 104 Wis. 580, 80 N. W. 939; *Yerex v. Eineder*, 86 Mich. 24, 14 Am. St. Rep. 113, 48 N. W. 875. And usually this cannot be done even in the interest of good husbandry: *Yerex v. Eineder*, 86 Mich. 24, 14 Am. St. Rep. 113, 48 N. W. 875. But it is not in every case that a land owner is required to keep a swamp on his own land with no right to drain it. Even in some of the cases just cited it is admitted that if the swamp or pond has a natural outlet through a stream, that the land owner may drain the swamp or pond into it, thus increase the volume, and accelerate the flow into such stream without incurring liability therefor, though the stream flows over the land of another and does some incidental damage by reason of its increased flow: *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521. As pointed out in this last case, such drainage is entirely different from draining water through wholly artificial channels onto the land of another, for the upper owner has a right to all the advantages of drainage, reasonably used, which the stream may give him. To the same effect is *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Rath v. Zembleman*, 49 Neb. 851, 68 N. W. 488. In *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, a pond existed on the land of an upper owner, which was fed only by surface water, and which drained in a certain direction through its accustomed outlet and natural drain. The court held that the pond could be drained by tile drainage, so long as the water was discharged in the regular channel, so that the natural flow of the surface water was not changed. This case goes further, perhaps, than any we have examined, since the natural outlet seems

not to have been a stream or watercourse, but only a channel through which ordinary surface water was accustomed to flow. Also the pond was a small one, and the court inferentially denies the right to drain a lake or large body of water onto another's land. Many of the cases are distinguishable upon the ground we have suggested—namely, that the marsh or swamp was not drained into the stream which was its natural drainage channel. Thus, in *Yerex v. Elnceder*, 86 Mich. 24, 24 Am. St. Rep. 113, 48 N. W. 875, the natural outlet of the swamp drained, instead of being through a brook running across the plaintiff's land, was through a creek running in the opposite direction away from such land. And in *Butler v. Peck*, 16 Ohio St. 335, 88 Am. Dec. 452, the natural drainage course of the marsh seems to have been in an entirely different direction.

c. **Discharging Surface Water into a Stream or Natural Channel.**—We have just noticed the difference between merely draining onto another's land, and draining into a natural channel or watercourse, which flows across such land. So far as streams or natural watercourses are concerned, there can be no doubt that one may drain into them, and thereby increase their volume, without subjecting himself to liability for any damage suffered by a lower owner: *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Treat v. Bates*, 27 Mich. 390; *Jackman v. Mills*, 137 Mass. 277; *Waffle v. New York Cent. R. R. Co.*, 53 N. Y. 11, 13 Am. Rep. 467; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Jenkins v. Wilmington etc. R. R. Co.*, 110 N. C. 438, 15 S. E. 193; *Peck v. Harrington*, 109 Ill. 611, 50 Am. Rep. 627; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 426, 57 Am. Rep. 445; *Rath v. Zembleman*, 49 Neb. 351, 68 N. W. 488.

In *Treat v. Bates*, 27 Mich. 390, swampy land was held to have been properly drained into a stream, which flowed opposite such land; See, further, on the distinction, already noted, between draining swamp land or ponds into a stream, and directly onto the land of a lower owner, *Commissioners v. Whitsitt*, 15 Ill. App. 818; *Rath v. Zembleman*, 49 Neb. 351, 68 N. W. 488.

A land owner may collect surface water on his land in an artificial drain and discharge it in one stream into a natural watercourse, providing it is a reasonable use of his land: *Jackman v. Mills*, 137 Mass. 277. This is an absolute right which a land owner has, and it is immaterial that a lower owner is injured by reason of an increase in the quantity of water flowing in such stream: *Waffle v. New York Cent. R. R. Co.*, 53 N. Y. 11, 13 Am. Rep. 467. Watercourses are the means which nature has provided for draining the land, and the rule is universal that where a watercourse exists the lower lands are under a natural servitude to receive all surface

water which is drained into them, at least up to the capacity of the stream. Hence the owner of lands drained by a stream may change and control the natural flow of the surface water therein, and may, by ditches or otherwise, accelerate the flow, or increase the volume, of water which goes into the stream: *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Jenkins v. Wilmington etc. R. R. Co.*, 110 N. C. 438, 15 S. E. 193. A land owner may pump large quantities of water into a stream from a mine, and thus accelerate and increase its flow: *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. St. 126, 57 Am. Rep. 445, 6 Atl. 453. Most of the cases limit the right to drain surface water into a stream to this extent, that a land owner cannot, by artificial channels, concentrate and discharge into a stream such water in quantities beyond the natural capacity of the stream, to the damage of other owners: *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Jackman v. Mills*, 137 Mass. 277. The principal case undoubtedly establishes a contrary doctrine for North Carolina, and, in holding that a land owner, in draining his land for a useful and proper purpose, is not necessarily limited to the capacity of the natural outlet, the opinion points out clearly that the test of the natural capacity of the stream cannot be safely or practically applied.

While the right to greatly increase the volume and accelerate the flow of a stream by draining into it large quantities of surface water is recognized, it seems not to be clear whether such a right prevails, when the natural drainage channel is not a stream or watercourse, but is, nevertheless, a well-defined channel. The doctrine of the principal case apparently applies only to streams. In Illinois the rule seems to be established that any regular and definite channel, through which surface water is accustomed to flow, is a sufficient watercourse, so that an upper owner may drain into it large quantities of surface water by means of artificial drains: *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Commissioners v. Whitsitt*, 15 Ill. App. 318. In *Ribordy v. Murray*, 70 Ill. App. 527, there was no well-defined watercourse with banks and a bed, but, said the court, "if the conformation of the land was such as to give the surface water flowing from one tract to another a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its natural flow is a watercourse, within the meaning of the rule applicable to this class of cases": *Oting Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53. We believe that a land owner should be permitted to make use of a natural drainage channel, running through his land, and over that of another, although the flow of surface water is greatly accelerated, and its volume increased, if such use is a reasonable one, even if the channel is not technically a watercourse: See *Gillfillan v. Schmidt*,

64 Minn. 29, 58 Am. St. Rep. 515, 66 N. W. 126; Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462; Vannest v. Fleming, 79 Iowa, 638, 18 Am. St. Rep. 887, 44 N. W. 906; Connell v. Stark, 108 Wis. 92, 83 N. W. 1092. In Gilfillan v. Schmidt, 64 Minn. 29, 58 Am. St. Rep. 515, 66 N. W. 126, in applying this rule, the court said: "The use by my neighbor of his property in a particular way may discom-
mode and injuriously affect me in the enjoyment of my property; but if his use is a reasonable one, I must submit to any reason-
able inconvenience. The question, after all, is really one of rea-
sonable use; and the common-law rule as to surface water is but
an application of the universal rule, perhaps somewhat enlarged in
the interests of agriculture and the improvement of lands."

MITCHELL v. RALEIGH ELECTRIC COMPANY.

[129 N. C. 166, 39 S. E. 801.]

NEGLIGENCE.—THE FAILURE OF AN ELECTRIC LIGHT COMPANY TO KEEP ITS WIRES INSULATED, as required by a municipal ordinance, is prima facie evidence of negligence. (p. 736.)

NEGLIGENCE.—WHAT IS CONTRIBUTORY NEGLIGENCE, upon a given state of facts, and whether there is any evidence of it, are questions of law for the court. (p. 737.)

ELECTRIC LIGHT COMPANIES—PRESUMPTION AS TO INSULATION.—A LINEMAN, who undertakes to convey his wire over the electric wires of another company may presume that they were properly insulated, as required by a municipal ordinance. (p. 738.)

ELECTRIC COMPANIES—PRESUMPTION OF NOTICE.—WHERE AN ABRASION IN AN INSULATED WIRE of an electric light company has been in existence for two years, the court will presume that it was known by the company. (p. 738.)

NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTION.—Where the negligence of the defendant appears, and there is no evidence of contributory negligence on the part of the plaintiff's intestate, the court should instruct the jury that the negligence of the defendant was the proximate cause of the intestate's death (p. 739.)

Action to recover damages for the negligent killing of the plaintiff's intestate.

J. B. Batchelor, for the plaintiff.

R. L. Gray, for the defendant.

¹⁶⁹ **COOK, J.** The plaintiff was clearly entitled to have the instructions hereinafter discussed and prayed for given to the

jury, if not in the exact language, certainly in substance, which does not appear in the charge as given.

The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound it exists, and, being odorless, the only means of its discovery lie in the senses of feeling, communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition. Recognizing this peril to those in its use, or who, in the exercise of their liberty in passing along the streets of the city, might accidentally come in touch or contact with electric wires, or who, in the management of their business affairs, would have other wires suspended over the streets in close proximity to electric wires, the city authorities of Raleigh deemed it proper to require that all such wires should be covered with durable waterproof insulation. The duty imposed under this ordinance was imperative. Its strict observance was necessary for the safety of all. The electric wires must be insulated, and it was no less the duty¹⁷⁰ of defendant company to keep them so at all times and at all places. The nature of the mischief intended to be remedied required it. A failure to comply with this ordinance was prima facie evidence of negligence, and there being no evidence in rebuttal offered by defendant company, and none appearing from the evidence of plaintiff, it was error in his honor in refusing to give instruction No. 1, prayed for by plaintiff, viz.: "If the jury find from the evidence that the defendant left its wires uninsulated, as stated by the witnesses, this was negligence on the part of the defendant, and the jury will so find."

In *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, the court held that where the statute imposed a duty upon a railroad company to fence its slack-pits, its failure

to do so was evidence of negligence, for which it was liable. In the case of *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51, it is held by the supreme court of Louisiana that the failure of defendant company to have the splices on its wires perfectly insulated, when so required to do by the ordinance of the city, was negligence on its part. The ordinance being a contract with each and every inhabitant of the city, its standard of duty was fixed by it, and its failure to comply with it was negligence. Also, to the same effect it is held in *Tobey v. Burlington etc. Ry. Co.*, 94 Iowa, 256, 62 N. W. 761, and cases there cited; *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369.

"A company maintaining electric wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others might have the right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company, under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in such condition at such places. And the fact that it is very expensive or inconvenient to so insulate ¹⁷¹ them will not excuse the company for failure to keep their wires perfectly insulated. So, one who, in the course of his employment, is brought into close proximity to electrical wires, is not guilty of contributory negligence by coming in contact therewith, unless done unnecessarily or without proper precautions for his safety. And where the wires, if properly insulated, would not be a source of danger, such person is only obliged to look for patent defects, and not for latent defects; and a person who touches an electrical wire from which the insulation is worn off, if he does it in ignorance of the nature and condition of the wire, is not negligent": *Joyce on Electric Law*, sec. 445.

The evidence in the case at bar shows that defendant company's wires were strung on poles along the same street with those of the Bell Telephone Company. At places, as was in this case, one set of wires diagonally crossed the other at a distance of only about ten feet. Each had a common right, and it was the duty of each to exercise all reasonable precautions for the prevention of injury to the servants who may be sent there in the performance of duty. Each is bound to know that the servants of the other may come in contact with its wires. The fact that defendant company's wire was insulated was cal-

culated to induce intestate to rely upon its safety, even if the wire he was paying out should come in contact with it: *Newark Electric etc. Co. v. Garden*, 78 Fed. 74; 6 *American Electrical Cases*, 275.

We think his honor also erred in refusing the third instruction prayed for, viz.: "There is no evidence of contributory negligence on part of the intestate of plaintiff, and the jury will therefore find the second issue 'No.'" What is contributory negligence upon a given state of facts, and whether there is any evidence, are questions of law for the decision of the court; and a review of the evidence fails to discover any act done by the intestate which he ought not to have done, or the omission to do any act which he ought to ¹⁷² have done. The witnesses testified that the proper way would have been to have conveyed the rope or hand-line and wire over the arm of the tall Bell pole not far off (and not through the trees as was done), which any man who understood his business would have done. But it also appears from the evidence that a similar accident occurred at or near the same place when the arm of a pole was used and the wire carelessly allowed to slack and fall upon the electric wire. So, if intestate used a different mode to accomplish his purpose, that act would not necessarily be negligence upon his part. And having undertaken to use the trees in supporting his wire while conveying it over and across the defendant company's wire, he had a right to presume that the electric wires were properly insulated, as required by the ordinance, and it was his duty to look for patent defects only: *Clements v. Louisiana Electric etc. Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51.

There is no evidence to show that intestate so managed or mismanaged his wire as to cut through the insulation of defendant company's wire, nor is there any evidence to show that the abrasion in the insulation was seen, or by due care could have been seen, by him—in extent, the evidence shows that it varied from the width of a pencil to two inches, and was suspended thirty feet above the street. It does appear that his wire came in contact with, and rested upon, the electric wire, but there is no evidence to show that it caused the abrasion in which it rested; nor was there any evidence to show that he knew of its existence. The fact that it was there, and had been for two years, and had been seen and known to exist there for two years by at least two people (who were witnesses in this case), the court must presume that it was or ought to have

been known by defendant company. So where an electric light company permitted a live wire to remain on the surface of a street for three weeks, and a traveler was injured by contact with such live wire, it was held that ¹⁷⁸ the court would presume, after such a period, that the company had notice of the fact, and was liable for the injury: *Joyce on Electric Law*, sec. 450.

The fourth instruction asked was: "There is no evidence of any other cause of death of plaintiff's intestate, except from the electricity coming from the wire of the defendant; therefore, if the jury find from the evidence that the death of the intestate of plaintiff was caused by the current of electricity passing into his body from the charged wire of the defendant, the jury will find the third issue 'Yes'"—the third issue was, "Was the negligence of the defendant the proximate cause of the death of intestate of plaintiff?"

The negligence of defendant appearing, and no evidence of contributory negligence by intestate, his honor erred in refusing this instruction. There was evidence tending to show that intestate was killed by the electrical current, which clearly appears; and the jury should have been charged as requested.

As there will have to be a new trial, and the questions raised by the other exceptions may not again arise, we think it unnecessary to discuss them.

New trial.

Montgomery, J., dissents.

If Electric Companies Fail to Insulate Their Wires Properly, as required by municipal ordinance, and one on a roof engaged in work requiring him to risk coming in contact with the wires is injured, he is entitled to damages, and no presumption of contributory negligence will be indulged: *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51; *Griffin v. United Electric Light Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675. It is the duty of such companies to exercise the utmost care to prevent injury to persons coming in contact with their wires, and whether this duty has been performed in a given case is ordinarily for the jury: *Perham v. Portland etc. Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 24. See, further, *Brown v. Edison etc. Co.*, 90 Md. 400, 78 Am. St. Rep. 442, 45 Atl. 182; *Brush Elec. Light etc. Co. v. Lefevre*, 93 Tex. 604, 77 Am. St. Rep. 898, 57 S. W. 640.

SMITH v. WILMINGTON AND WELDON R. R. CO.

[129 N. C. 173, 39 S. E. 805.]

MASTER AND SERVANT.—THE MODE OR SYSTEM IN THE EXECUTION OF WORK lies exclusively within the discretion and will of the master, over which the servant has no control, and the master is not liable to him for personal injuries received, although the master might have adopted a safer method. (p. 742.)

MASTER AND SERVANT.—THE TEST OF A MASTER'S LIABILITY is not the danger of the employment, but the neglect of the master in the duty which he owes the servant. (p. 742.)

MASTER AND SERVANT—WARNING AGAINST OBVIOUS RISKS.—When the service to be performed is attended with obvious dangers, there is no duty upon the master to warn the servant against it. (p. 742.)

MASTER AND SERVANT—ASSUMPTION OF RISKS.—WHEN A SERVANT IS ORDERED TO CHANGE THE METHOD of doing dangerous work to one more dangerous, the danger of both modes being apparent and known to the servant, he assumes all the ordinary hazards naturally incident to the work. (p. 742.)

F. R. Cooper, J. D. and E. W. Kerr, and George E. Butler, for the plaintiff.

Junius Davis and H. L. Stevens, for the defendant.

173 COOK, J. The motion to dismiss made by defendant company in conformity to the rules of the statute ought to have been allowed. The evidence does not show any breach of duty by the employer. There is no suggestion of defects in the tools employed, place of work, or danger in the performance of the work known, or ought to have been known, to the employer and not imparted to the employé—the only contention being that the method was changed.

Plaintiff and Hardison, another employé, were engaged in “blocking” a steel brake-beam—that is, “it was necessary to cut it down from a width of three-quarters inch to a depth of one-sixteenth inch, to let a hanger come down and fit and join on to a cylinder,” from which we understand that an incision was necessary to be made in the beam three-quarters inch long and one-sixteenth inch deep to let in the hanger, for it to fit in and join to the cylinder. Plaintiff and his coworker were doing this work in the usual way, by “blocking”—that is, one would hold the chisel upon the beam and the other would strike it straight down with a maul, thus driving it into the beam. After cutting down to the right depth—making an incision at

each end—the beam was turned over and the piece was blocked out, and went down. While so working, defendant's representative, Nelms, ordered that the beam be "chipped" instead of "blocked," saying that the company had ordered these beams chipped out, and he wanted them chipped. It was claimed that blocking weakened the beam. In chipping, one held the chisel upon the place to be cut, and the other struck upon the chisel with the maul, forcing off gradually small pieces at a time, until the desired width and depth were reached. Under the mode of "blocking," the chips or small pieces went directly downward; while under that of chipping, they would "fly off with tremendous force, and you can't tell where they will strike or which way they will go."

176 Plaintiff had been using the maul, but when they changed from blocking to chipping, Hardison relieved plaintiff by taking the maul, and let him hold the chisel. Plaintiff was holding the chisel at an angle, and at the third strike a chip flew off, struck the cuff (which projected from the beam close to the chipping) and bounded back and upward, striking plaintiff in the eye, doing the injury complained of.

When Nelms ordered that the beams be chipped, Hardison replied: "I don't like to chip them out." He replied, "Well, you must chip them," and moved right off. Plaintiff said: "Hardison, what are you going to do?" He replied: "I don't like to chip them out; might be danger getting hurt." Plaintiff said: "Well, we must obey orders or leave." He said: "That's all facts." Plaintiff said: "Let's go to work and chip them out."

It does not appear clearly from plaintiff's evidence, as stated in the record, whether he had ever before done any chipping. In his direct examination he says: "This was the first one he had ever done so; prior to that had always blocked them." In his cross-examination he said: "Had to handle castings, and sometimes, when rough, chipped some smooth. Chips fly in chipping castings; some danger in it. Chipped castings, off and on, all the time. . . . The steel beams came into use after that." However, it is clear that he had not theretofore chipped any steel beams. Plaintiff also testified that he had no time to reflect or think about it when the order to chip was given. He was told to do it, and he did it; and if he had, it would have done no good. It was obey your orders or be discharged.

There was evidence showing that the chipping of castings was of frequent occurrence, and that chipping them was more dangerous than chipping steel; that castings were more brittle and would break up into more pieces; while steel was tougher and more likely to be in one piece at a time.

¹⁷⁷ Defendant company claimed that "blocking" weakened the beam, and therefore wanted the incision made by chipping which, as it claimed, did not. In other words, it was how the work should be done, and not what should be done in doing it. The mode or system in the execution of work lies exclusively within the discretion and will of the master over which the servant has no control; and the master is not liable to him for personal injuries received, although the master might have adopted a safer method: 3 Elliott on Railroads, sec. 1289.

Plaintiff, as it appears, was a man of intelligence and an experienced workman. For some considerable time he had been employed in the shops of defendant company, where the beams had been chipped as well as blocked; whether upon castings or steel it was not material, as the process was the same. The danger and hazard of both modes or systems were apparent to plaintiff, and when he changed the work from one to the other, he assumed all the ordinary hazards naturally incident to the work. In *Myers v. W. C. De Pauw Co.*, 138 Ind. 590, 38 N. E. 377, it is held that the fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking. The test is not the danger of the employment, but the neglect of the master in the duty which he owes the servant. When the service to be performed is attended with obvious dangers, there is no duty upon the master to warn the servant against it. And in *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387, 26 S. E. 23, it is held that if a servant has equal knowledge with the master of the dangers incident to the work, and has sufficient discretion to appreciate the peril, his continuance in the employment is at his own risk.

Plaintiff contends that he did not have time to reflect—"Hadm't given thought to danger of chipping; had no time to reflect or think about it." He does not contend that he did ¹⁷⁸ not know that the chipping mode was dangerous, and it does not seem to us that he brings himself within the rule of sudden risk, undertaken in response to an order which must be executed speedily without having time to take in the situation.

An order to do a dangerous act in the performance of a duty (as was the case in *Shadd v. Georgia etc. R. R. Co.*, 116 N. C. 968, 21 S. E. 554, and also in *Halton v. Southern R. R. Co.*, 127 N. C. 255, 37 S. E. 262, is not involved in this case; it was an order to change the system of doing the work. In making this change, no emergency existed. Plaintiff could foresee the possibility of danger as well as the employer. It was obvious to him that the chips would have to escape, and, being an experienced man, must, indeed ought, to have known that violent blows by the maul would hurl them off with great force and in various directions. But the real cause of the injury was not by a chip flying from the chisel held by plaintiff, but by one which rebounded from the cuff, which was very near and projected from the beam. The possibility that a chip would strike the cuff and thence rebound and strike plaintiff's eye depended upon numerous contingencies—the angle at which the chisel was held with reference to the cuff; the distance of plaintiff's eye from the cuff; the position of his head above the cuff with the relation to the position of the chisel upon the beam, whether squarely or diagonally across; the force of the blow by the maul and the shape of the chip which struck the cuff. It is hardly probable that a similar result under like circumstances could be accomplished again, even by design—certainly, it was not done by either of the two licks first given.

From all the evidence in the case, we are unable to see any breach of duty by defendant company to plaintiff. In accepting the employment in the shops, plaintiff assumed the ordinary risks and dangers incident to the work to be done on the beams, and being accidentally injured, the burden must be borne himself.

Error.

An Employee Assumes the Risk of an obvious danger connected with his employment: *Lamson v. American Axe etc. Co.*, 177 Mass. 144, 83 Am. St. Rep. 267, 58 N. E. 585; *Brown v. Electric Ry. Co.*, 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415. The measure of a master's duty to his servants is the care required by the ordinary usage of the business. If a servant, aware of the risks and dangers incident to the business thus conducted, sustains an injury, he is not entitled to recover, unless the master is otherwise negligent: *Omaha Bottling Co. v. Theller*, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821. But see *Starr v. Kreuzberger*, 129 Cal. 123, 79 Am. St. Rep. 92, 61 Pac. 641.

A Master is not Required to Give Warning of Dangers known to the servant, or which are so obvious that by the exercise of care he could have known: *Newbury v. Getchel etc. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582, 61 N. W. 743; *Moore Lime Co. v. Richardson*,

95 Va. 826, 64 Am. St. Rep. 785, 28 S. E. 334; Omaha Bottling Co. v. Theiler, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821. It is otherwise where there is any hidden or unusual danger connected with the work: Ribich v. Lake Superior Smelting Co., 123 Mich. 401, 81 Am. St. Rep. 215, 82 N. W. 279.

FULLER v. KNIGHTS OF PYTHIAS.

[129 N. C. 818, 40 S. E. 65.]

THE PRACTICE OF ADMITTING EVIDENCE OUT OF ITS ORDER, and ruling upon evidence upon the assumption that other evidence has been introduced, or that it would be afterward, should not be allowed. (p. 745.)

PRIVILEGED COMMUNICATIONS.—AS BETWEEN ATTORNEY AND CLIENT, the attorney's mouth is sealed for all time except by consent of his client. (p. 746.)

PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT.—UNDER THE NORTH CAROLINA STATUTES, a judge, in furtherance of the administration of justice, may compel a physician to disclose the information acquired by him from his patient. (p. 746.)

PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT.—A WAIVER, in an application for life insurance, of the right of the insured to object to the evidence of a physician acquired while attending him, is good and binding upon the beneficiary. (p. 746.)

Action by a beneficiary upon a life insurance policy. The application of the insured contained this waiver: "And I hereby, for myself, my heirs, assigns, representatives and beneficiaries, expressly waive any and all provisions of law, now or hereafter in force prohibiting or excusing any physician heretofore or hereafter attending me, professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material."

McLean & McLean, for the plaintiff.

Patterson & McCormick, for the defendant.

COOK, J. Defendant's counsel insist in this court that it did not have a fair trial, upon the grounds (in part) that it was most material to its defense to elicit from the physicians

their opinions and the knowledge they possessed of the cause of assured's death and his true physical condition, especially as to his heart, at and before the time of making the application upon which its defense was based, which knowledge they had obtained while being his attending physicians; and that they had a right, by reason of the waiver set out in the application, to have their evidence as to those matters submitted to the jury. But that the court below excluded such evidence and confined them, the physicians, in their evidence to such knowledge as they had obtained otherwise than as attending physicians, under the act of 1885, chapter 159, viz.: "No person duly authorized to practice physic or surgery shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon; provided that the presiding judge of a superior court may compel such disclosure if, in his opinion, the same is necessary to a proper administration of justice."

But it is contended by plaintiff's counsel that defendant did not except to the instruction by the court to Dr. McMillan and other physicians that they could not testify as to such communications, and could not express an opinion based on such knowledge so acquired, and therefore this court cannot review such ruling.

323 The record in the case is conflicting upon this contention. While it is stated in the "supplemental statement to be added, . . . the defendant did not except to such instructions," yet it does appear in the record (pages 20, 21), upon the examination of Dr. McMillan, who was admitted to be an expert, that the following questions were propounded to him, excluded and exception taken, viz.: "State, Doctor, for what purpose you administered narcotics to the deceased, John R. Fuller. . . . State, Doctor, from your attendance upon deceased, from having treated him, and from your knowledge of his habits and condition, if you can give an opinion as to the cause of his death. . . . Defendant proposed to show by this witness the purpose for which he attended him, Fuller." Excluded and exception taken. Also, upon the examination of Dr. Pope, who was admitted to be an expert: "From your knowledge of the deceased, your association with him, and your knowledge of his use of whisky and narcotics, state what, in your opinion, was the cause of his death." Excluded upon ob-

jection, and excepted to. Also, "From what he told you when he came to you in a nervous condition, what was the cause of his nervousness?" Excluded upon objection, and excepted to.

Couple these questions with the statement of his honor (in the "additional statement") that "the court ruled as matters of law that the evidence was competent or incompetent, as shown in the statement of the case on appeal, just as it would have done if the application had been admitted before such rulings were made," it clearly appears to us from the record that the exception was taken, and became competent upon the introduction of the application thereafter. This practice, however, of admitting evidence out of its order, and ruling upon evidence upon the assumption that other evidence had been introduced, or that it would be afterward, is not approved and should not be allowed. The confusion ³²⁴ involved in the trial of this action seems to have arisen from that cause.

The question, therefore, first requiring our decision is whether the plaintiff is bound by the waiver set out in the application, notwithstanding the statute of 1885.

At common law there is no privilege extending to the relation between patient and physician; while, as between attorney and client, the attorney intrusted with the secrets of the cause by the client shall not be compelled to give evidence of such conversation or matters of privacy as come to his knowledge by virtue of such trust and confidence; but, with the client's consent, it may be waived, and he may be compelled to testify. The privilege between patient and physician created by our statute is less stringent and more lax than that of the common law between attorney and client. As between the latter, the attorney's mouth is sealed for all time (except by consent of client), and he cannot be compelled by the court to testify; while under our statute it is provided that the judge, in furtherance of the administration of justice, may compel the physician to disclose the information acquired by him from his patient.

We are, therefore, of the opinion that the waiver stated in the application is good and binding upon the beneficiary, and that his honor erred in excluding the testimony of the physician as to knowledge and information acquired from deceased while attending him professionally. This view is sustained by many authorities cited by the learned counsel of defendant, among which are *Grand Rapids etc. R. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173; *Foley v. Royal Arcanum*, 78 Hun, 222, 28

N. Y. Supp. 952; *Adrezens v. Mutual Reserve etc. Assn.*, 34 Fed. 870; *Dougherty v. Metropolitan Life Ins. Co.*, 87 Hun, 15, 33 N. Y. Supp. 873.

The other exceptions and assignments of error seem to have grown out, to a great extent, of the exclusion of the evidence³²⁵ above stated, and causes for the same may not again arise. We therefore deem it unnecessary to pass upon them.

For the error above stated, there will have to be a new trial.

Privileged Communications Between Physician and Patient are discussed in the monographic note to *Thompson v. Ish*, 17 Am. St. Rep. 565-571. Consult, also, *Cramer v. Hurt*, 154 Mo. 112, 77 Am. St. Rep. 752, 55 S. W. 258; *Lane v. Spokane etc. Ry. Co.*, 21 Wash. 119, 75 Am. St. Rep. 821, 57 Pac. 367. A waiver of the right to have information acquired by a physician, while attending his patient, regarded as privileged, is not against public policy, when made in an application for life insurance, and is therefore valid. It may be enforced after the death of the patient against any person claiming under the contract of which the waiver was part: *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456.

HARDEN v. NORTH CAROLINA RAILROAD COMPANY.

[129 N. C. 354, 40 S. E. 184.]

NEGLIGENCE—FAILURE TO PROVIDE AUTOMATIC COUPLERS.—A RAILROAD COMPANY is responsible for injuries to its employes, which would not have occurred if its cars had been provided with self-acting couplers. (p. 747.)

RAILROAD LEASE—EFFECT ON LIABILITY.—UNDER A CHARTER AUTHORITY "to farm out the right of transportation," a railroad company cannot, by a lease, relieve itself from liability for any acts or negligence or torts committed by its lessee. (p. 749.)

Overman & Gregory, for the plaintiff.

Charles Price, F. H. Busbee, and A. B. Andrews, Jr., for the defendant.

³⁵⁵ **CLARK, J.** The plaintiff was a brakeman in the service of the Southern Railway Company (lessee of defendant), on a freight train, and was injured in making a coupling between a box-car and the shanty-car "with a link and the old-style draw-head." The shanty-car was not equipped with automatic couplers, nor was the train fully equipped with Janney couplers, or other modern self-coupling devices, and the court

charged the jury, citing *Greenlee v. Southern Ry. Co.*, 122 N. C. 977, 65 Am. St. Rep. 734, 30 S. E. 115—since followed in *Troxler v. Southern Ry. Co.*, 124 N. C. 189, 70 Am. St. Rep. 580, 32 S. E. 550, and other cases—as follows: “If you find that the freight train was not fully provided with modern self-acting couplers, and that the plaintiff would not have been injured had the cars been so provided, you will find the first issue ‘Yes’ and the second issue ‘No.’” The judge followed the decisions of this court, and, without repeating the argument therein, it is sufficient to say that we reaffirm our former rulings holding a railroad company responsible for injuries to its employes which would not have occurred if there had been provided by it those humane devices protecting the lives and limbs of its employes which are in general use. The reports of the United States intercommerce commission, issued by the authority of the federal government, show the reduction of many thousands annually in the number of employes killed or maimed in coupling cars since the introduction of automatic couplers (which now is compulsory under the act of Congress as to all interstate roads). This should ³⁵⁶ be a sufficient answer to all complaints as to our former ruling. If the lives and limbs of employes can be saved by such provision of improved appliances, public policy and humanity require the courts to exact liability for failure to furnish them.

The principal point made, however, is in the effort to induce this court to overrule a still longer line of decisions which hold this lessor, the North Carolina Railroad Company, liable for the act and defaults of its lessee, the Southern Railway Company. The charter of the North Carolina Railroad Company (Laws 1848-49, c. 82, sec. 19) authorizes the company “to farm out its right of transportation over said railroad, subject to the rules above mentioned.” There are no other words from which a right to lease the road can be inferred. As at the date of the charter railroads were comparatively new, and the popular idea was that a railroad company was to maintain the roadbed and “farm out” rights of transportation over it, as was the case with canal companies and is to-day the case with express companies and many “fast freight” and “through lines,” it was thought by many that these words did not authorize, and were not intended to authorize, a lease of its entire property, which lease had the effect to take it out of a “state system” running from the mountains to the seacoast under state control, and make it a part of an interstate line running north and

south, under the control of foreign corporations, to the utter destruction of the "state system" intended by the charter of the defendant. The authority to lease, based upon the permission "to farm out its rights of transportation," came before this court in *State v. Richmond etc. R. R. Co.*, 72 N. C. 634, and that expanded construction was sustained by a divided court, Judge Settle writing the opinion, Judge Bynum dissenting in a remarkably able opinion. Judge Rodman did not sit. If it were a new question, this court might possibly hold with Judge ³⁵⁷ Bynum as to the reasonable construction of the meaning of the words "to farm out the right of transportation," but the lessee would rely upon the fact that it took its lease relying upon the construction placed by this court upon the meaning of those words. But it also made its lease subsequent to the decision of this court—often since repeated—that those words did not allow the lessor to rid itself, by any lease made under authority conferred by those words, of liability for any acts or negligence or torts committed by the lessee as to the world, its passengers or its employes, the latter being held in effect to be simply subemployes of the lessor, employed by its agent for the operation of the road, its lessee.

In *Aycock v. Raleigh etc. R. R. Co.*, 89 N. C. 321 (1883), it had been held, Smith, C. J., the authorities "fully sustain the proposition that the defendant company leasing the use of its road or permitting the use of it by another company, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servants operating its own train," citing the authorities.

In *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959, this very charter of the defendant company was elaborately considered, and in an able opinion by Mr. Justice Avery, concurred in by the entire court, it was held that no lease made by virtue of the above-cited words—there being no clause of exemption granted to the lessor—would exempt the defendant from liability for the wrongful acts, defaults, or negligence of its lessee, and hence that the lessor company was liable for injuries sustained from the negligence of its lessee by a section hand employed by such lessee.

This decision was rendered by this court at February term, 1895, and the lessor and lessee, both aware of the construction placed by the court upon a contract by lessor to ³⁵⁸ "farm out

its right of transportation" on August 16th following executed the lease under which the lessee is now operating the defendant's road. Both parties had that decision in view and provided for the liability of the defendant for all the acts and defaults of its lessee by a stipulation in said lease (which lease is filed as a part of the record in this case) for a deposit of "not less than one hundred and seventy-five thousand dollars in cash, or its equivalent, to be applied" to the performance of the stipulations in the contract to be performed by the lessee, and among them "to any judgment or judgments recovered in any court of the state or of the United States when finally adjudicated, for any tort, wrong, injury, negligence, default, or contract done, made, or permitted by the parties of the second part, its successors, assigns, employes, agents, or servants for which the party of the first part shall be adjudged liable, whether the party of the first part is sued jointly with or separately from the party of the second part," and further provides to what agents of the lessee notices of such suits shall be given by the lessor when sued singly, and for the renewal and maintenance of said sum whenever diminished by such application of any part thereof.

The lease was made subsequent to the decision of the Logan case. Both lessor and lessee knew of the continuing liability of lessor under any lease authorized by the words "farm out," as construed by this court, and stipulated, in view of such liability, a deposit being put up, to be maintained at a fixed sum to guarantee the lessor, the defendant herein. If the lease is valid because made subsequent to the decision of a divided court in *State v. Richmond etc. R. R. Co.*, 72 N. C. 634, it does not lie in the mouth of the lessor to contend that it does not remain liable for all acts of its lessee in the operation of its road under a lease made subsequent to the decision of a unanimous court in *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959, especially when it has stipulated against loss therefrom by exacting ^{and} a deposit from its lessee. And, in fact, the lessor has not complained. This objection has several times been raised in this court, but always by counsel of the lessee, and ruled upon again and again, always in conformity to the precedents in *Aycock v. Raleigh etc. R. R. Co.*, 89 N. C. 321, and *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959. The defendant has never averred any loss, detriment, or probable damage by reason of its being held liable for the acts of its lessee as its

agent in the operation of the road. The lessee, the Southern Railway Company, is the only railroad company operating in this state which claims to be a foreign corporation, as we know from the statutes incorporating all others, except possibly one other lessee. It has been stated by its counsel in their place here that the Southern Railway Company has "domesticated"—but it is unnecessary to discuss here the point which has been decided in *Debnam v. Southern Bell Tel. Co.*, 126 N. C. 831, 36 S. E. 368. Whether the lessee be a foreign corporation or not, the lessor when it entered into this lease knew that by the terms of its charter, as construed by this court, it would remain liable, notwithstanding such lease, for the acts of its lessee. *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959, has been cited and approved on this point: *Tillett v. Norfolk etc. R. R. Co.*, 118 N. C. 1043, 24 S. E. 111; *James v. Western etc. R. R. Co.*, 121 N. C. 528, 28 S. E. 537; *Norton v. North Carolina etc. R. R. Co.*, 122 N. C. 937, 29 S. E. 886; *Benton v. North Carolina etc. R. R. Co.*, 122 N. C. 1009, 30 S. E. 333; *Pierce v. North Carolina R. R. Co.*, 124 N. C. 93, 32 S. E. 399; *Perry v. Western North Carolina R. R. Co.*, 128 N. C. 473, 39 S. E. 27, and in *Raleigh v. North Carolina R. R. Co.*, 129 N. C. 265, 40 S. E. 2, in most of which cases this defendant was a party.

Had Logan's case not been decided prior to the lease made by the lessor, and stipulations in view thereof made in the lease, and viewed as an original question, it is sustained by the overwhelming weight of authority and upon reason. In 20 American and English Railroad Cases Annotated, at page 847, the rule is laid down: "A railroad company which has leased its road, cars and engines, and allows the lessee company to ⁸⁰⁰ operate the same, is liable to third persons or the public for the carelessness and negligence of the lessee, and for defects in the construction and maintenance of the road and its equipments, unless there is a statutory provision to the contrary" (and there is none in this case). For this proposition it there cites thirty-six cases from the United States courts and the courts of the different states, and from England, and it is not necessary to repeat them here. In *Railroad Co. v. Brown*, 17 Wall. 450, the court says: "It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees. The

operation of the road by the lessees does not change the relations of the original company to the public," and cites with approval 1 Redfield on Railways, to same effect. Also to the same purport are 1 Beach on Private Corporations, section 366, 1 Spelling on Private on Private Corporations, 135, and several other authorities cited in *Logan v. North Carolina R. R. Co.*, 116 N. C. 946 et seq., 21 S. E. 959.

In *Harmon v. Columbia etc. R. R. Co.*, 28 S. C. 401, 13 Am. St. Rep. 686, 5 S. E. 835, the words of the charter construed were almost identical with those in defendant's charter, and it was held that a lease made thereunder did not relieve the lessor from liability for the acts of its lessee. In *National Bank v. Atlanta etc. Ry. Co.*, 25 S. C. 216, the same ruling is made as to nondelivery of freight, the court saying: "We are unable to appreciate the distinction attempted to be drawn by appellant's counsel between the liability of a railroad company which has leased its line to another to actions *ex delicto* and *ex contractu*. The foundation for such liability is that such company, by accepting its charter, assumed obligations to the community from which it cannot absolve itself by leasing its road to another company; and as such carrier is not only under an obligation to carry passengers safely, but also to deliver goods intrusted to it for transportation, ³⁶¹ we think the same principle which would make the lessor liable in the one case would make it liable in the other."

In *Balsley v. St. Louis etc. R. R. Co.*, 119 Ill. 68, 59 Am. Rep. 784, 8 N. E. 859, it is said that the liability of the lessor for the acts of the lessee is not merely because the lessee is the agent of the lessor, but, further, because the lessor, in consideration of the grant of its charter, undertook the performance of duties and obligations, and it is against public policy for it to be relieved therefrom without the express consent of the legislature.

In 20 American and English Railroad Cases, at page 848, it is said: "A railroad company which leases its road pursuant to a statutory authority, which does not contain any provision releasing it from the performance of its duties to the public, is liable for personal injuries sustained through negligence in the operation of the road by the lessee." To the same purport are: *United States: Thomas v. Railroad Co.*, 101 U. S. 83; *Railroad Co. v. Brown*, 17 Wall. 445; *Railroad Co. v. Barron*, 5 Wall. 90; *York etc. R. R. Co. v. Winans*, 17 How. 39. *Georgia: Singleton v. Southwestern R. R. Co.*, 70 Ga.

464, 48 Am. Rep. 574; Macon etc. R. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678. Illinois: Ohio etc. R. R. Co. v. Dunbar, 20 Ill. 623, 17 Am. Dec. 291; Peoria etc. R. R. Co. v. Lane, 83 Ill. 448; Pittsburgh etc. Ry. Co. v. Campbell, 86 Ill. 443; Wabash etc. Ry. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705; Balsley v. St. Louis etc. R. R. Co., 119 Ill. 68, 59 Am. Rep. 785, 8 N. E. 859; Chicago etc. R. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290. Maine: Whitney v. Atlantic etc. R. R. Co., 44 Me. 362, 69 Am. Dec. 103; Stearns v. Atlantic etc. R. R. Co., 46 Me. 95; Nugent v. Boston etc. R. R. Co., 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797. Massachusetts: Quested v. Newburyport etc. R. R. Co., 127 Mass. 204; Braslin v. Somerville Horse R. R. Co., 145 Mass. 64, 13 N. E. 65, where the contract of lease is much as in this case. Missouri: Brown v. Railroad Co., 27 Mo. App. 394. Nebraska: Charlotte v. Omaha etc. R. R. Co., 26 Neb. 159, 41 N. W. 1106. New York: Abbott v. Johnstown etc. Ry. Co., 80 N. Y. 27, 36 Am. Rep. 572. ³⁶² North Carolina: Aycock v. Raleigh etc. R. R. Co. (1883), 89 N. C. 321; Logan v. North Carolina R. R. Co., 116 N. C. 940, 21 S. E. 959; Tillett v. Norfolk etc. R. R. Co., 118 N. C. 1043, 24 S. E. 111; James v. Western etc. R. R. Co., 121 N. C. 528, 28 S. E. 537; Norton v. North Carolina R. R. Co., 122 N. C. 937, 29 S. E. 886; Benton v. North Carolina R. R. Co., 122 N. C. 1009, 30 S. E. 333; Pierce v. North Carolina R. R. Co., 124 N. C. 93, 32 S. E. 399; Perry v. Western North Carolina R. R. Co., 128 N. C. 473, 39 S. E. 27; Raleigh v. North Carolina R. R. Co., 129 N. C. 265, 40 S. E. 2. Oregon: Lakin v. Willamette etc. R. R. Co., 13 Or. 436, 57 Am. Rep. 25, 11 Pac. 68. South Carolina: Harmon v. Columbia etc. R. R. Co. 28 S. C. 401, 13 Am. St. Rep. 686, 5 S. E. 835; Hart v. Railroad Co., 33 S. C. 427, 12 S. E. 9; National Bank v. Atlanta etc. Ry. Co., 25 S. C. 216. Texas: International etc. R. R. Co. v. Underwood, 67 Tex. 589, 4 S. W. 216; Gulf etc. Ry. Co. v. Morris, 67 Tex. 692, 54 S. W. 156; Central etc. Ry. Co. v. Morris, 68 Tex. 49, 3 S. W. 457. Washington: Cogswell v. West Street etc. Ry. Co., 5 Wash. 46, 31 Pac. 411.

In 71 Am. Dec. 295, it is said by Judge Freeman in his notes: "It is a well-settled doctrine that, in the absence of legislative authority permitting a lease and exempting the company from liability, it is responsible for the torts of the lessee," citing many cases.

In Nelson v. Vermont etc. R. R. Co., 26 Vt. 717, 62 Am. Dec. 614, Chief Justice Redfield says: "As to the liability of the
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defendants for the acts of their lessees, who were running the defendants' road under a long lease, we think there can be no doubt. Unless we can hold the defendants thus liable, they might put their road into the hands of corporations or individuals of no responsibility."

If a railroad corporation could relieve itself of liability by leasing, it would follow that leases could be made to another corporation with no tangible assets—as, indeed, the lessee in this case, if a foreign corporation, has none in this state—leaving the travelers and shippers over its line, the general public and its employes alike, without recourse on the property of the corporation which was chartered to operate the road, and which is left in receipt of the rent, which might readily be made high enough to cover the profits. Thus ³⁶³ the company would, by a device of a lease, receive the profits without incurring the liabilities of its business.

In many cases it has been held that a bona fide mortgage cannot have that effect: *Acker v. Alexandra etc. R. R. Co.*, 84 Va. 648, 5 S. E. 688; *Naglee v. Alexandra etc. R. R. Co.*, 83 Va. 707, 5 Am. St. Rep. 308, 3 S. E. 369; *Wilmington etc. R. R. Co. v. Burnett*, 123 N. C. 210, 31 S. E. 601; and the rights of mortgagees for money presumably applied to debts are stronger than those of lessors.

The question here is not the liability of lessees, which also exists, but of the right of the lessor to put off the liabilities incident to the franchise given it, while continuing to enjoy its profits through the medium of a lease. This the corporation owning the property cannot do.

No error.

Cook, J., Dissented from the Holding of the court on the proposition that the lessor railroad company is liable for the acts of its lessee, upon the ground that the charter never contemplated such a liability, and quoted sections 18 and 19 of the charter to show that the defendant was granted power to lease its exclusive right of transportation, and that, therefore, "the 'exclusive right of conveyance or transportation' granted in section 18, being 'farmed out,' or leased, under the authority and power granted in section 19, it must necessarily follow under the terms of the lease that all contracts by the lessor of the same ceased, and there could be no relationship of principal and agent existing between the parties; and under section 19 the lessee company 'received from them [the North Carolina Railroad Company] the right of transportation,' and were 'deemed and taken to be a common carrier.' And it must likewise follow as a logical result that when the actual as well as legal right of con-

tract ceased, under the authority of law, all liability on account of such contract must likewise cease. It would be an anomaly in law to hold one party responsible for the acts of another over whom he had no authority, in fact or by right, and between whom there was no privity of interest. If this construction of the chartered rights of the North Carolina Railroad be sound in law, then it cannot be liable for a contract or tort made or done by the sole owner of the right of transportation. And, therefore, it is my opinion that the plaintiff is not entitled to recover against the defendant company."

Justice Cook then enters into an elaborate review of the authorities generally cited to sustain the rule that a lessor railroad company is liable for the acts, contracts, and torts of its lessee, beginning with *Aycock v. Raleigh etc. R. R. Co.*, 89 N. C. 321, which he distinguishes on the ground that the defendant had not sold or leased its exclusive right to run trains over its road, and that the injury complained of was really due to the defendant's own negligence. The justice finds that *Harmon v. Columbia etc. Ry. Co.*, 28 S. C. 401, 13 Am. St. Rep. 686, 5 S. E. 835, is the only authority cited in opinion of the court, which sustains its decision, and that this case rests for its authority solely on *Railroad Co. v. Brown*, 17 Wall. 445, without examining the facts in that case. The other cases cited in the main opinion are distinguished by Justice Cook in this way. In some of them the alleged lessee was in fact the agent of the lessor, and hence the rule as to principal and agent would apply, and the alleged lessor would be liable: *Railroad Co. v. Brown*, 17 Wall. 445; *National Bank v. Atlantic etc. Ry. Co.*, 25 S. C. 216; *Great Western Ry. Co. v. Blake*, 7 Hurl. & N. 986; *Lakin v. Willamette etc. R. R. Co.*, 13 Or. 436, 57 Am. Rep. 25, 11 Pac. 68; *Miller v. New York etc. Ry. Co.*, 20 N. Y. St. Rep. 157, 3 N. Y. Supp. 245; *Nelson v. Vermont etc. R. R. Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Wabash etc. Ry. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705. In other cases, the lease, being made without authority of law, was held to be ultra vires and void: *Thomas v. Railroad Co.*, 101 U. S. 71; *Ohio etc. R. R. Co. v. Dunbar*, 20 Ill. 623, 17 Am. Dec. 291; and hence the lessee is deemed the agent of the lessor corporation: *Abbott v. Johnstown etc. Ry. Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *International etc. R. R. Co. v. Underwood*, 67 Tex. 593, 4 S. W. 216; *Central etc. Ry. Co. v. Morris*, 68 Tex. 49, 8 S. W. 457; *Nelson v. Vermont etc. R. R. Co.*, 26 Vt. 717, 62 Am. Dec. 614. And in some cases where authority to lease was conferred, the statute prohibited the lessor from relieving itself from liability: *Stearns v. Atlantic etc. R. R. Co.*, 46 Me. 95; *Whitney v. Atlantic etc. R. R. Co.*, 44 Me. 362, 69 Am. Dec. 103; *Quested v. Newburyport etc. R. R. Co.*, 127 Mass. 204; *Braslin v. Somerville Horse R. R. Co.*, 145 Mass. 64, 13 N. E. 65; *Brown v. Railroad Co.*, 27 Mo. App. 394. In

a few of the cases the injury seems to have resulted from the defendant's own negligence: *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797; *Baksey v. St. Louis etc. R. R. Co.*, 119 Ill. 68, 59 Am. Rep. 785, 8 N. E. 859. In *Cogswell v. West Street etc. Ry. Co.*, 5 Wash. 46, 31 Pac. 411, the lessor was actually operating the road at the time of the injury; and in *Pittsburgh etc. Ry. Co. v. Campbell*, 86 Ill. 443, *Railway Co. v. Mayea*, 49 Ga. 355, 15 Am. Rep. 678, *Charlotte v. Omaha etc. R. R. Co.*, 26 Neb. 166, 41 N. W. 1106, *Naglee v. Alexandria etc. R. R. Co.*, 83 Va. 707, 5 Am. St. Rep. 308, 3 S. E. 369, and *Steller v. Railway Co.*, 49 Wm. 609, 6 N. W. 303, there was no relation of lessor and lessee, one company simply permitting another to run trains over its road; while in *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464, 48 Am. Rep. 574, the rule seems to have been followed simply because of prior cases.

Justice Cook, concluding that *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959, is the only case on which the doctrine really rests, holds that this case should be overruled, since no interest or vested right will thereby be disturbed, and because "it is better to return to a sound principle than to continue in error."

The Failure to Equip its Freight-cars with Self-coupling Devices by a railroad company is negligence per se, for which it is liable to an employé injured by coupling cars by hand, whether he is guilty of contributory negligence or not: *Troxler v. Southern Ry. Co.*, 124 N. C. 189, 70 Am. St. Rep. 580, 32 S. E. 550; *Greenlee v. Southern Ry. Co.*, 122 N. C. 977, 65 Am. St. Rep. 734, 30 S. E. 115. Compare the monographic note to the last case cited, 65 Am. St. Rep. 738-742.

On the Liability of a Lessor Railroad Company for the acts and negligence of the lessee company, see the monographic note to *Lee v. Southern Pac. R. R. Co.*, 58 Am. St. Rep. 147-156.

STATE v. PETERSON.

[129 N. C. 556. 40 S. E. 9.]

IN AN INDICTMENT FOR FORGERY, it is not necessary to allege loss of the instrument, and in the absence of the instrument, only its substance need be charged. (p. 757.)

FORGERY—EVIDENCE.—WHERE A FORGED INSTRUMENT IS SHOWN TO BE LOST, a witness may give its substance from memory. (p. 757.)

FORGERY—SUFFICIENT EVIDENCE.—If it appears that the accused was in possession of the forged instrument, attempting to utter, pass, or deliver it, this is sufficient evidence to go to the jury. (p. 757.)

VOLUNTARY DRUNKENNESS is never an excuse for crime. (p. 757.)

FORGERY.—THE ABSENCE OF A REVENUE STAMP from a note has no bearing upon the question whether the defendant forged it. (p. 757.)

FORGERY—PRESUMPTION.—Where one is found in the possession of a forged instrument, endeavoring to obtain money or advances upon it, this raises a presumption that he either forged it or consented to its forgery. (pp. 757, 758.)

Brown Shepherd, for R. D. Gilmer, attorney general, for the state.

Self & Whitener and L. L. Witherspoon, for the defendant.

557 CLARK, J. In an indictment for forgery it is not necessary to allege loss of the instrument in the indictment, and, in the absence of the instrument, only its substance need be charged: 2 McClain's Criminal Law, sec. 805; Mead v. State, 53 N. J. L. 601, 23 Atl. 264; People v. Badgely, 16 Wend. 53; State v. Callahan, 124 Ind. 364, 24 N. E. 732; though it would be better practice in such cases to aver the loss of the instrument, or that it is in defendant's possession. The instrument being shown to be lost, the witness stated he could not give the entire contents of the note verbatim, but could give its substance. This was competent: State v. Lowry, 42 W. Va. 205, 24 S. E. 561; Commonwealth v. Snell, 3 Mass. 82; 13 Am. & Eng. Ency. of Law, 2d ed., 111.

The court properly refused to charge that there was no evidence to go to the jury. Even if there had been no other evidence, the defendant being in possession of the forged instrument attempting to utter, pass or deliver it, was evidence, and the court charged, at request of defendant, that the jury should not convict unless they were satisfied beyond a reasonable doubt that the defendant did so attempt for personal gain or fraudulent purpose. The evidence did not authorize the court to give the instruction asked as to drunkenness. Voluntary drunkenness is never an excuse for crime: State v. Kale, 124 N. C. and cases cited at page 819, 32 S. E. 896, 897; Howard v. State, 37 Tex. Cr. Rep. 494, 66 Am. St. Rep. 812, 36 S. W. 475.

The absence of a revenue stamp has no bearing upon the inquiry whether the defendant forged the paper writing, though not decorated with such stamp: 1 Randolph on Commercial Paper, sec. 213; State v. Hill, 30 Wis. 416; Thomas v. State, 40 Tex. Cr. Rep. 562, 76 Am. St. Rep. 740, 51 S. W. 242.

And such is the law in England also: *Hawkeswood's Case*, 3 East P. C. 955.

The defendant excepted to the charge because of the following instructions: "1. Where one is found in the possession of a forged instrument and is endeavoring to obtain money or advances upon it, this raises a presumption that ⁵³³ defendant either forged or consented to the forging such instrument, and nothing else appearing the person would be presumed to be guilty." In this there was no error: *State v. Morgan*, 19 N. C. 348; *State v. Britt*, 14 N. C. 122; *State v. Lane*, 80 N. C. 407; *State v. Allen*, 116 Mo. 548, 22 S. W. 792. "2. If you are satisfied beyond a reasonable doubt that the paper [in this case the note] was a forgery, and that the defendant had it in his possession and tried to obtain money from Crowell or Shuford or the bank upon it, then this raises a presumption of guilt, and, unless he has rebutted it, you will return a verdict of guilty." This is also warranted by the precedents: 2 McClain's Criminal Law, sec. 809, and cases there cited.

No error.

The Crime of Forgery is discussed in the monographic note to *Arnold v. Cost*, 22 Am. Dec. 806-321. An unstamped instrument may be the subject of forgery: See the monographic note to *Garland v. Gaines*, 84 Am. St. Rep. 197-199.

Forgery.—If an indictment for uttering a forged instrument sets out only its substance, and alleges that it is lost or destroyed, or that it is in the possession of the accused, and not within the reach of the process of the court, this is sufficient notice to the accused to produce the instrument. His failure to do so is sufficient to admit secondary evidence of its contents: *Thornley v. State*, 36 Tex. Cr. Rep. 118, 61 Am. St. Rep. 836, 34 S. W. 264.

STATE v. HUNT.

[129 N. C. 686, 40 S. E. 216.]

CONSTITUTIONAL LAW.—A TAX UPON EMIGRANT AGENTS—that is, persons hiring laborers to be employed in another state—is neither a restriction upon interstate commerce nor an interference with the freedom of contract. (p. 759.)

POLICE POWER.—THE BUSINESS OF AN EMIGRANT AGENT is of such a nature and importance as to justify the exercise of the police power in its regulation. (pp. 759, 760.)

CONSTITUTIONAL LAW—TAXING TRADES.—AN EMIGRANT AGENT who hires laborers to be employed in another state is, within the meaning of the North Carolina constitution, exercising a trade or profession, upon which a tax may be properly levied. (pp. 760, 761.)

Brown Shepherd, for Robert D. Gilmer, attorney general, for the state.

Holton & Alexander, for the defendant.

⁶⁸⁶ CLARK, J. The defendant is indicted for acting as "emigrant agent in procuring laborers to accept employment in another state" without having obtained a license as emigrant agent. The special verdict finds that "the defendant has been getting hands to work for the Norfolk and Western Railway Company in the states of Virginia and West Virginia; that he has been engaged in the business of obtaining hands to accept employment in another state," and that on demand he refused to pay said tax.

The statute provides (Laws 1901, c. 9, sec. 84): "On every emigrant agent or person engaged in procuring laborers to accept employment in another state, a tax of twenty-five dollars." Section 104, same chapter, prescribes: "Every individual or firm carrying on or conducting either of the trades or business upon which a specific amount of license tax is levied shall pay ⁶⁸⁷ the required license tax for every separate location in which the trade or business is conducted, unless otherwise herein provided," and section 102 authorizes the county to "levy the same tax and no more."

The defendant moved in arrest of judgment on the ground that the act is in violation of the federal constitution, because: 1. It is contrary to the interstate commerce clause, article 1, section 8, clause 3; 2. That it impairs the privileges of the citizens of one state in other states; 3. Because it wrongfully affects the functions and operations of the federal government; 4. For "these and other reasons" the act is void. The points thus presented have been recently decided by the United States supreme court: *Williams v. Fears* (Dec. 10, 1900), 179 U. S. 270, 21 Sup. Ct. Rep. 128. The Georgia statute there called in question imposed a tax "upon each emigrant agent, or employer or employé of such agents, doing business in this state, the sum of five hundred dollars, for each county in which business is conducted." It is held, in the opinion by Fuller, C. J., that this tax "upon emigrant agents, meaning persons engaged in hiring laborers to be employed beyond the limits of the state, does not amount to such an interference with the freedom of transit, or of contract, as to violate the federal constitution; nor does it deny the equal protection of the laws, because the business of hiring persons

to labor within the state is not subjected to a like tax; that these labor contracts are not in themselves interstate commerce, nor is the tax upon such occupation a burden upon such commerce." The opinion further holds that "the business itself is of such nature and importance as to justify the exercise of the police power in its regulation." The opinion is so full and complete as to render unnecessary any discussion by us.

The defendant also demurred to the indictment that it was in conflict with the state constitution in that: 1. It is not ~~ess~~ such a tax as is authorized to be levied by article 5, section 3, of the state constitution; 2. Because it restricts a harmless occupation; 3. That it prescribes no supervision of the business, and is, therefore, not an exercise of the police power; 4. Because of the unreasonableness of the license fee.

The tax, if regarded as a tax upon a trade or business, is within the terms of section 3, article 5, of the constitution of North Carolina. It is not a restriction upon the business any more than any other tax upon trades and professions. That it can also be upheld as an exercise of the police power is decided in the above cited case in 179 U. S. The reasonableness or unreasonableness of the tax is a matter for the legislature, not for the courts: Tiedeman on Police Powers, p. 277, sec. 101. It is only when the license fee is exacted solely as a police regulation that the court can consider whether it is so unreasonable as to amount to a prohibition, and that only as to vocations which cannot be prohibited. And in no aspect could we hold this tax to be an unreasonable one in amount. We understand the legislative imposition of "twenty-five dollars for every separate location in which the trade or business is conducted" to mean each town, city, or village where the business is conducted as a separate, distinct business requiring the personal attention of the agent or his subagent. Only those counties in which such subagencies are operated can levy a tax, and then only to duplicate the twenty-five dollars levied by the state. It does not appear that the defendant operated in more than one county and one town, and, indeed, the judgment only requires the defendant to pay fifty dollars, "the tax he should have paid," and the costs. It is also by section 103 of said chapter 9 of the Laws of 1901 made the duty of the sheriff in all cases of conviction for failure to pay the license tax on any business, occupation, etc., to collect before a justice of the peace a penalty of fifty dollars for the benefit of the public schools.

The defendant relies principally upon *State v. Moore*, 113 ~~689~~ N. C. 697, 18 S. E. 342, but that case was decided upon an entirely different state of facts, and, so far as any expressions therein conflict with what is said in the above cited case in 179 U. S., or with this opinion, it is overruled.

It is a matter of some inconsistency that the defendant, professing to act as agent, representing the Norfolk and Western Railroad Company, should be appealing to this court as a pauper. From the special verdict it would seem he was not the agent of the company, but a contractor agreeing to find and ship hands for a specified consideration.

No error.

MONTGOMERY, J., concurring. I concur in the opinion of the court on the single ground that the defendant was exercising a trade, and the act of the legislature imposing a tax of twenty-five dollars on that trade was constitutional: Const., art. 5, sec. 3; *State v. Worth*, 116 N. C. 1007, 21 S. E. 204. It is a tax, pure and simple. It is found in the revenue act, chapter 9, section 84, of the acts of 1901, and is there called a tax.

DOUGLAS, J., concurring. I concur in the judgment of the court that the tax is constitutional, because it seems to me to come within the expressions "trades" and "professions" used in section 3, article 5, of the constitution. I am not disposed to strictly construe those words as referring only to the "learned professions," which are said to be theology, law, and medicine. Such a construction would exclude many occupations that have always been regarded as legitimate subjects of taxation under the form of license. I think the definition most probably contemplated by the constitution is the following taken from Webster. A profession is said to be "that of which one professes knowledge, the occupation, if not mechanical, agricultural or the like, to which one devotes one's self; the business which one professes to understand, and to follow ~~689~~ for subsistence." On the other hand, it is said that "trade comprehends every species of exchange or dealing, either in the produce of land, in manufactures, in bills or in money; but it is chiefly used to denote the barter or purchase and sale of goods, wares, and merchandise either by wholesale or retail." Neither of these words is equivalent to occupation in its general sense. Therefore, I do not think that a farmer or a carpenter could be taxed as such, although one trading or

dealing in the products of either might be liable as a trader. In the case at bar, if the defendant had acted only as the agent of one principal, I would doubt his guilt, but as he appears to have engaged hands for more than one, I think it may be said to be his profession. As he must necessarily travel from place to place to hunt up hands, it seems to me that the tax applies to the county. I do not see any other construction that would be reasonable, and if the law must be construed so as to impose an unreasonable and prohibitory tax, then I think it would be unconstitutional. It does not seem to me to be necessary to interfere with Moore's case. I freely admit that in the sense used in the federal decisions, this clearly comes within the police power of the states; but the constitution of this state is equally binding upon us as that of the United States where there is no conflict, and it is the former which we are now construing.

Furchea, C. J., with Whom Concurred Cook, J., dissented, on the ground that article 5, section 3, of the state constitution, did not authorize such a tax, and that if it did, there would be no restriction upon the legislative power of taxation, except taxes on properties, moneys, and stocks. If the legislature may tax one for hiring hands to work on a railroad in another state, it can tax a man for hiring hands to work on a farm or in a factory, or even tax one who is engaged in farming.

The statute provides that an emigrant agent is liable for the tax and to indictment for "every separate location where it is carried on," and the dissent calls attention to the uncertainty of the phrase "every separate location," and that, as construed by the main opinion, the tax might become so large as to make the act unconstitutional, citing *State v. Moore*, 113 N. C. 697, 18 S. E. 342. The chief justice also denies that this revenue act is a police regulation, and is unwilling to overrule *State v. Moore*, 113 N. C. 697, 18 S. E. 342.

Power of State to License Vocation.—An act requiring any person engaged in hiring laborers in the state for employment beyond its borders to procure a license and pay a certain sum therefor, is constitutional: See the monographic note to *People v. Naglee*, 52 Am. Dec. 333. For other illustrations of the power of a state to exact licenses and license fees from those following particular callings, see *State v. Zeno*, 79 Minn. 80, 79 Am. St. Rep. 422, 81 N. W. 748; *State v. Snowman*, 94 Me. 99, 80 Am. St. Rep. 380, 46 Atl. 815; *Wilkie v. Chicago*, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 356, 47 Atl. 165; *Pullman Co. v. Adams*, 78 Miss. 814, 84 Am. St. Rep. 647, 30 South. 757; note to *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 508-512.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**DELAWARE COUNTY TRUST, SAFE DEPOSIT, AND
TITLE INSURANCE COMPANY v. HASER.**

[199 Pa. St. 17, 48 Atl. 694.]

NEGOTIABLE INSTRUMENTS.—THE MAKER OF AN ACCOMMODATION NOTE is liable thereon, as if the payee had handed the money to such maker and he had given it to the real debtor. The fact that the money was delivered directly to the latter cannot change the maker's liability on the obligation. (pp. 765, 766.)

NEGOTIABLE INSTRUMENTS — ACCOMMODATION MAKERS—RIGHTS OF, AS INDORSERS OR SURETIES.—When an accommodation maker of a promissory note is, as between him and the payee, a principal debtor, payment is the only way by which he can be discharged. He is not entitled to the rights of an indorser or surety, though the payee knows him to be an accommodation maker. Hence, an extension of time to the real debtor cannot avail such maker as a defense. (p. 766.)

NEGOTIABLE INSTRUMENTS — ACCOMMODATION MAKERS FOR THIRD PERSONS.—THE LIABILITY of one who signs a promissory note as maker, though merely for the accommodation of the payee or indorser, is the same whether the accommodation is for the payee or indorser, or for a third person. He cannot, in either case, escape liability by proving that he was but a surety, and that an extension of the time for payment was given to the payee or indorser. (p. 768.)

NEGOTIABLE INSTRUMENTS GIVEN AS COLLATERAL SECURITY.—THE LIABILITY OF THE MAKER of a promissory note, given as collateral security for a debt, is not affected by anything less than a discharge or release of the original debtor, and the holder thereof may maintain an action thereon, without first resorting for payment to the original debtor. (p. 768.)

PAYMENT.—THE TAKING OF A NOTE IS NOT PAYMENT of a precedent indebtedness without an agreement to that effect. (p. 770.)

Assumpsit on a promissory note.

A. B. Geary, for the appellant.

O. B. Dickinson, for the appellee.

²⁰ MESTREZAT, J. The Harmonia Singing Society of Chester applied to the Delaware County Trust, Safe Deposit, and Title Insurance Company, the appellee, for a loan to assist it in the erection of a proposed building. The loan was granted on June 8, 1893, but was not taken out by the society. On December 5, 1893, the application was renewed, and a loan of \$5,000 was awarded upon the condition that the society procure a responsible party to furnish \$15,000 on a first mortgage, and that the loan be secured by a note for \$5,000, signed by not less than ten members of the society, and also by a mortgage of like amount, second to the \$15,000 mortgage, to be held as collateral for the note and also as protection for the members of the society signing the note. The money was not to be paid out on the loan until the society's building was completed and freed from all liens and claims so that the mortgages might be the first and second liens.

The loan was accepted on the terms on which it had been granted. The appellant and nine other members of the society executed and delivered to the plaintiff the following note, which was signed by the appellant and his codefendants, and is the note in suit:

"\$5,000.

Chester, Pa., December 13, 1893.

"One month after demand we, or either of us, promise to pay to the order of the Delaware County Trust, Safe Deposit, and ²¹ Title Insurance Company five thousand dollars without defalcation."

On January 10, 1894, the society directed the insurance company "to pay the proceeds of the note dated December 13, 1893," to Bunyea and McCray or their order, when the Harmonia Singing Society hall had been completed.

On July 13, 1894, the mortgages required by the terms of the loan were executed, and on July 25, 1894, the \$15,000 mortgage was recorded, and on July 26, 1894, the \$5,000 mortgage was recorded. The proceeds of the \$15,000 mortgage and of the \$5,000 furnished on the note, less \$80 discount, were disbursed by the insurance company on account of the building erected by the society. This building seems to have been completed in the latter part of July, 1894, when, according to the

terms of the loan and the order of the society of January 10, 1894, the money was to be paid by the insurance company. But before the money was paid by the insurance company, it took another note from the society itself, dated July 26, 1894, for \$5,000, payable three months after date, which was duly discounted and the proceeds credited to the singing society. This note was entered and carried on the books of the insurance company with the statement that the insurance company held as collateral a second mortgage and a note signed by ten members. It was renewed from time to time until February 12, 1898, without any payments except the successive discounts, and each renewal was made after the preceding note fell due.

The \$15,000 mortgage was foreclosed in April, 1898, the property was sold for \$150, and nothing was realized from the sale applicable to the second mortgage which was given as collateral security for the payment of the note in suit.

On April 20, 1898, demand for the payment of the note was made by the plaintiff on the appellant and the other makers, which was refused, and on December 5th of the same year this action was brought.

On the trial of the cause in the court below the defendants claimed that they were relieved from liability on the note, for the reason that they were to be regarded as sureties although they appeared on the note as makers, and that as sureties the claim could not be enforced against them because demand for the payment of the note was not made in a reasonable time, ²² and the acceptance of the note of the society on July 26, 1894, and its subsequent renewals, without notice to them, relieved them from liability. The learned court below, however, directed a verdict for the plaintiffs, and judgment having been entered, F. X. Haser, one of the defendants, took this appeal.

It is contended here by the appellant that the note in suit, and on which he is one of the makers, was taken as collateral security for the note of July 26, 1894, on which the society was the maker, and that the relation of principal and surety between the plaintiff and the defendants was thus established and continued throughout the transaction. The appellant's counsel concede that this is the controlling question in the case, and that its solution will determine the appellant's liability on the note in suit.

It clearly appears that the note in suit was given to secure a loan made by the plaintiff to the Harmonia Singing Society. It received the money, and the makers of the note were undoubt-

edly accommodation makers. Their credit was given the society that it might secure the loan from the plaintiff, and that meant that it might be employed for the purpose without restriction as to the manner of its use: *Smith v. Hine*, 179 Pa. St. 263, 36 Atl. 222. The obligation of the appellant and his codefendants could have been assumed by them in various ways. Their liability to the plaintiff might have been as mortgagors, as indorsers, as makers of a judgment note, as sureties, or as makers of a promissory note direct to the plaintiff. It is apparent that the liability of the defendants would have been different in each case, and that the right of the plaintiff to enforce its claim would depend on the liability assumed. In other words, the rights and liabilities of the defendants were fixed by the position in which their names appeared on the instrument given the plaintiff to secure its loan. In the present case it was determined by the parties that the loan should be secured by the promissory note of the defendants payable to the plaintiff, secured by a second mortgage on the property of the society. The appellant executed this note as a maker. He thus assumed a primary liability and made the indebtedness his own. The effect of his action and his liability on the note were the same as if the plaintiff had, on the delivery of the note, handed the money to the appellant and he had given it to the society. The²³ fact that the money was delivered directly to the society cannot change the appellant's liability on the obligation. His position on the paper determines the character of his responsibility on the note to the plaintiff. Nor does the fact that he was an accommodation maker and so known to the plaintiff, who is a holder for value, give him the rights of an indorser or surety, or change his responsibility for the indebtedness from what it would be as a maker for value.

Occupying, then, the position of a maker on the note in suit, the appellant was a principal debtor as between him and the plaintiff, and he can discharge the indebtedness, evidenced by the note, only as a maker for value could do. It is contended, however, by the appellant that he is released from his liability by the plaintiff's acceptance of the society's note of July 26, 1894, and its several renewals. The extension of time thus given the society for a good consideration would doubtless have that effect if the appellant were a surety for the principal debtor; but as he was an accommodation maker of the note in suit, and did not occupy the position of surety to the plaintiff, the giving of time by the plaintiff to the society on the note and its

renewals cannot avail the appellant as a defense in this action. Hence, when it is once determined that the appellant sustains to the payee the relation of maker or principal in the note, his liability on the contract is established, and his only relief is payment.

In *Bank of Montgomery County v. Walker*, 9 Serg. & R. 229, 11 Am. Dec. 709, an action was brought against Thomas Walker, the maker of a promissory note payable to Walker & George (Enoch Walker and Thomas George), by whom it was indorsed to the plaintiff bank, which discounted it and paid the money to Walker & George. The directors of the bank knew that Thomas Walker was an accommodation maker when they discounted the note. From time to time thereafter for one year Walker & George paid the discount on the note, and credit was given them without consulting the maker of the note. The defendant (Thomas Walker) contended that he was discharged from liability on the note in consequence of time being given to Walker & George, he being only a surety, and having received no notice of the indulgence to them. It was, however, determined otherwise. Mr. Justice Duncan, delivering the opinion, says: "The ²⁴ respective rights and liabilities of the parties, taking the note by what it represented itself to be, were then fixed. It is clear that nothing but satisfaction of the debt, or absolute renunciation of it, could discharge the maker. Time given to the maker might discharge the indorser; notice of nonpayment not being given to him might have the same effect; but time given to the indorser could not discharge the maker. Notice of nonpayment by the indorser was not necessary; it was his business to look to the payment. . . . The man who, to serve his friend, lends his name, as his debtor, in order that he may obtain money on that evidence of debt, cannot complain of it as a grievance, that when this purpose is answered, the law will consider him just in the character he has assumed; if maker, to be treated as maker; if indorser, as indorser. As he chose to be introduced into the world by the name and in the character of maker, he must be content to pass through, in all its stages, under that name, and he cannot, at his pleasure, cast it off, and deny it to any who has given credit to the paper on his assumed name and character; to such person he is bound, by every obligation of justice and morality, to sustain the character he has held himself out to be; he shall not be permitted to allege that this was an imposition, to which he gave his name, nor to gainsay its reality, by proof that it was a fiction."

The case was again in this court on another writ of error (Walker v. Bank of Montgomery County, 12 Serg. & R. 382), when Chief Justice Tilghman, speaking for the court, said: "We assume this broad principle, that the man who makes a promissory note, for the purpose of negotiation, must stand to it; he has placed himself in the situation of principal, and shall not afterward escape by alleging that he was but a surety. Although the plaintiffs knew that the defendant received no value from Walker & George, the payees, yet they knew also that it was his choice to serve his friends, by placing himself in the front of a negotiable instrument, and they had a right to suppose that he was willing to abide the consequences. They were therefore under no obligation to give him notice of any indulgence which they might think proper to give his friends, the indorsers; it was his business to make inquiry into these things. He knew that he had not paid the note himself, and if he wanted to know whether the indorsers had paid it or received indulgence from the bank, he should have sought for ²⁵ information." In Penn Safe Deposit and Trust Co. v. Stetson, 175 Pa. St. 164, 34 Atl. 659, Mr. Justice Williams, delivering the opinion of the court, says: "An accommodation note is a loan of the credit of the maker to the payee, which he may use as freely and with the same effect as to the maker as he could use a note given for a full consideration. It is no defense for the maker of such a note when sued by the indorsee to aver the character of the note, or knowledge of its character by the indorsee. If the note in suit had been given for the accommodation of the Spring Garden Bank, and the fact had been known to the trust company when it took it in exchange for its deposit of money in the bank, it would not constitute a defense in this action."

The acceptor of a bill of exchange sustains the same relation to the payee that the maker of a note does to his payee. It has accordingly been held that it is no defense to the acceptor of a bill of exchange that the holder has since received another bill from the drawer payable at a subsequent date for a part of the amount, and given time to him for the balance, though the bill was accepted for the accommodation of the drawer, and that was known to the holder when he received the bill: White v. Hopkins, 3 Watts & S. 99, 37 Am. Dec. 542; Lewis v. Hanchman, 2 Pa. St. 416.

These cases have since been followed in this court, and it may now be considered as well settled in this state that one

who signs a note as maker, though he does it merely for the accommodation of the payee or the indorser, thereby places himself in the situation of a principal, and will not be allowed to escape the consequences of his action by subsequently alleging that he was but a surety. Time given the payee or indorser, therefore, will not operate to release him from his obligation. These principles are equally applicable where the note is made for the accommodation of a third person, as in the present case. The relation created by the maker is that of principal debtor, and his rights and liabilities are the same whether the accommodation is for the payee in the note or for a third person. The liability of the maker does not depend upon the person for whose accommodation the note is made, but upon the situation in which the maker has placed himself by assuming the position of a principal debtor.

²⁶ Conceding that the renewals of the note of July 26, 1894, were extensions of the time of payment of the indebtedness, the liability of the makers of the note of December 13, 1893, is not affected whether that note be regarded as collateral security for the original debt or for the note of July 26, 1894. This arises from the fact that the liability of the maker of a promissory note, given as collateral security for a debt, is not affected by anything less than a discharge or release of the original debtor. His liability to the payee in the first instance is primary and absolute, and when the note is delivered by the payee or any subsequent holder as collateral, its character is not changed, and the maker's contract is not altered when it is in the hands of the transferee. Hence an action may be brought on the note by the party who holds it as collateral, and the amount recovered when it becomes due without first resorting for payment to the original debtor: *Lishy v. O'Brien*, 4 Watts, 141; *Lazior v. Nevin*, 3 W. Va. 622. "That [collateral security] is, as I understand it," says Sergeant, J., in *Lishy v. O'Brien*, 4 Watts, 141, "a concurrent security, consisting of a promissory note, by which the promisors engaged to pay, without any condition or contingency, at the time mentioned, the amount of the note to the holder. . . . The object of giving a collateral security is to furnish another fund out of which the principal debts may be paid. . . . The holder has a right to avail himself of these funds, by collecting the money on choses in action, when due, and applying it to the payment of his debt. . . . A promissory note delivered to the creditor as collateral security is his; and, if not paid when due, he may sue upon it. . . . I believe

it has never been doubted that if the debtor delivers to his creditor a promissory note of another for the payment of a sum of money at a certain day, as collateral security for a debt due or growing due by the debtor to the creditor, the latter is entitled to demand the contents of the note when due, and to sue for it if unpaid; nor has it been considered a defense to the promisor for noncompliance with his contract that the note had thus been transferred. As to such promisor, it is *res inter alios acta*, with which he has nothing to do; his duty is to fulfill his contract by paying the legal holder."

The loan was made by the plaintiff to the society, as we have seen, in 1893, but the money was not to be disbursed until the ²⁷ completion of the society's building, which was in July, 1894. There is nothing to show that it was the intention of the parties that the note of July 26, 1894, was accepted as a payment for the indebtedness. Without an agreement to that effect, it would not operate as such: *Collins v. Busch*, 191 Pa. St. 549, 43 Atl. 378. Hence it must be regarded only as an additional security for the original indebtedness.

No question arises here between the holder of a collateral security and his debtor as to the failure of the former to collect from the maker of the note by which the debtor has been injured by the delay.

We are of opinion that the appellant was not discharged from his liability on the note under the facts disclosed by the evidence, and therefore the court was right in directing a verdict for the plaintiff.

The assignments of error are overruled and the judgment is affirmed.

Accommodation Paper.—The contract and liability of an accommodation party to a negotiable instrument are generally considered those of a surety for the party accommodated: See the monographic note to *Altoona Second Nat. Bank v. Dunn*, 81 Am. St. Rep. 745; *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95, 22 South. 580; note to *Credit Co. v. Howe Machine Co.*, 1 Am. St. Rep. 137. In some jurisdictions, however, an accommodation maker is held liable as principal: Note to *Altoona Second Nat. Bank v. Dunn*, 81 Am. St. Rep. 745. And as against a holder for value he can defend only on the ground of actual payment: *Philler v. Patterson*, 168 Pa. St. 468, 47 Am. St. Rep. 896, 32 Atl. 26. See, further, the monographic note to *Cadwallader v. Hirschfeld*, 72 Am. St. Rep. 676-684.

Payment.—Acceptance of note for the amount of a debt is not a payment thereof unless the parties expressly so agree: *Johnston v. Barrills*, 27 Or. 251, 50 Am. St. Rep. 717, 41 Pac. 656. Acceptance of checks as payment is considered in the extended note to *Meyer v. Green*, 69 Am. St. Rep. 846-851.

**MOORE v. NIAGARA FIRE INSURANCE COMPANY OF
NEW YORK.**

[199 Pa. St. 49, 48 Atl. 869.]

FIRE INSURANCE—UNOCCUPIED BUILDING.—THERE CAN BE NO RECOVERY upon a policy of fire insurance, which provides that it shall be void if the building, "whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days," though it appears that, at the time the insurance was placed, the building, a new dwelling-house built to be sold, and never before tenanted, was, to the knowledge of the defendant's agents, and therefore to its knowledge, unoccupied; that no question of its occupancy, present or future, was raised between the parties as affecting the contract; and that the plaintiff took the policy, as prepared by the defendant's agents, without reading it and believing it to accord with his agreement with them; but where it further appears that the building remained unoccupied for more than ten days thereafter, and that, after being occupied for some months, it became again vacant and so remained for more than ten days until destroyed by fire. (p. 778.)

Assumpsit on a policy of fire insurance. A verdict was returned in favor of the plaintiff, subject to a reserved point, the substance of which is stated in the opinion, but the court entered judgment for the defendant non obstante veredicto, and the plaintiff appealed. In the trial court the following opinion was delivered by

49 ENDLICH, J. Under the pleadings and the charge of the court, the verdict must be taken to establish the facts, that, at the time the insurance was placed, the building, a new dwelling-house built to ⁵⁰ be sold, and never before tenanted, was, to the knowledge of defendant's agents and therefore to its knowledge, unoccupied; that no question of its occupancy, present or future, was raised between the parties as affecting the contract; that plaintiff took the policy as prepared by defendant's agents without reading it and believing it to accord with his agreement with them; that the building remained unoccupied for more than ten days thereafter; that after being occupied for some months it became again vacant and so remained for more than ten days until destroyed by fire. The pleadings, the charge, and the verdict being matters of record, these facts, together, of course, with the tenor of the policy sued upon, appear by the record, and are therefore to be considered in connection with, and as if incorporated in, the point reserved: *Phoenix Silk Mfg. Co. v. Reilly*, 187 Pa. St. 526, 41 Atl. 523.

The provision relied on by defendant is this: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days"—the misdescription of the building in the policy as "occupied as dwelling" being of no importance as affecting the validity of the policy: *Landes v. Safety Mut. Fire Ins. Co.*, 190 Pa. St. 536, 542, 42 Atl. 961; *Mullen v. Union Cent. Life Ins. Co.*, 182 Pa. St. 150, 155, 37 Atl. 988; *Dowling v. Merchants' Ins. Co.*, 168 Pa. St. 234, 239, 31 Atl. 1087; *Shanahan v. Agricultural Ins. Co.*, 6 Pa. Sup. Ct. 65.

It will be observed that the provision quoted predicates the avoidance of the insurance upon either of two conditions—(a) the property being vacant and so remaining for ten days, or (b) its becoming vacant after being occupied and then remaining vacant for ten days. The former has reference to a state of things presently existing when the policy is issued and continuing thenceforth without interruption. The latter, as is said in *Haight v. Continental Ins. Co.*, 92 N. Y. 51, 54, "assumes a policy already existing and valid in its inception," and refers to a vacancy commencing in the future. It is a mistake, however, to suppose that the condition (a) undertakes to avoid the insurance simply because the building is unoccupied when insured. On the contrary, it contemplates that possibility as consistent with the attaching of the policy. In order to come ⁵¹ within the operation of the condition, there must be both a present vacancy and a continuance thereof for ten days. This interpretation is required by a "fair grammatical construction of the language of the clause" (*England v. Westchester Fire Ins. Co.*, 81 Wis. 583, 29 Am. St. Rep. 917, 51 N. W. 954), and the rule, unquestionable as it is, that an insurance contract is to be enforced according to its true spirit, "its meaning must be obvious and require no straining in order to provoke a forfeiture": *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133, 144. The effect of the provision being as stated, there is no relevancy to this case in the decisions which say that, where an insurance company insures a vacant property, knowing or not caring that it is vacant, a clause in the policy avoiding the insurance if the property be vacant must be deemed waived and the company held estopped from taking advantage of it: *Short v. Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 138; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243, 12

N. E. 609; Williams v. Niagara Fire Ins. Co., 50 Iowa, 561; Aurora Fire etc. Ins. Co. v. Kranich, 36 Mich. 289; or in those which, basing themselves upon such decisions, treat the provision in this policy as identical in effect with the clauses there passed upon: Milwaukee Mechanics' Ins. Co. v. Brown, 3 Kan. App. 225, 44 Pac. 35; Rochester Loan etc. Co. v. Liberty Ins. Co., 44 Neb. 537, 48 Am. St. Rep. 745, 62 N. W. 877; German Ins. Co. v. Frederick, 57 Neb. 538, 77 N. W. 1106. Nor, again, are those cases of any persuasive value which deal with nonoccupancy clauses not limiting the period of vacancy; for the absence of such limit seems to be a material element in determining their effect and the extent of the waiver implied in the insurance of an unoccupied building. Says Andrews, J., in Bennett v. Agricultural Ins. Co., 106 N. W. 250, 12 N. E. 609: "If the contract contains no provision limiting the vacancy, it may continue during the whole time of the policy and the premium presumably covers the risk. The condition (there) in question imposes no obligation upon the owner of a dwelling-house, insured as vacant property, to occupy it for any period during the running of the policy, etc.," thus implying that the fixing of such a limit might be attended with a different result—the result, indeed, approved in England v. Westchester Fire Ins. Co., 80 Wis. 583, 29 Am. St. Rep. 917, 51 N. W. 954, viz.: An obligation on the part of the insured to occupy the property within the period limited and a forfeiture ⁵² of the insurance in the event of its not being so occupied. It is true that the ruling in Devine v. Home Ins. Co., 32 Wis. 471, ignoring this distinction, is to the contrary. But, though not explicitly overruled (for it is not noticed at all) in the latter decision of the same court, it certainly can no longer be regarded as of any weight. In reason and common sense, there seems to be abundant justification for the distinction. Where a company, with its eyes open, insures unoccupied property and takes the premium fixed by itself, the insertion of a stipulation in the policy that the insurance shall be void if the property is what it is, looks very like an attempt to perpetrate a fraud. At any rate, it is a stipulation which must be rejected in the interpretation of the contract, not upon the basis of its reformation by parol evidence (Walton v. Agricultural Ins. Co., 116 N. Y. 322, 22 N. E. 443), but under the familiar rule established in this state by the decisions in Barnhart v. Riddle, 29 Pa. St. 92, and a multitude of cases following its lead, that evidence to explain the subject matter of a

written contract is always receivable, together with the equally settled principle that every contract must be construed by applying its language to the thing about which the parties were contracting (2 Parsons on Contracts, *517; *West Republic Min. Co. v. Jones*, 108 Pa. St. 55, 56; *Doster v. Friedensville Zinc Co.*, 140 Pa. St. 147, 150, 21 Atl. 251); and in the light of the circumstances surrounding the making of the contract and affecting its subject matter: *McKeesport Machine Co. v. Ben Franklin Ins. Co.*, 173 Pa. St. 53, 57, 34 Atl. 16), and illustrating the objects to be accomplished: *Allison's Appeal*, 77 Pa. St. 221, 226; *Richardson v. Clements*, 89 Pa. St. 503, 505, 33 Am. Rep. 784; *Phoenix Silk Mfg. Co. v. Reilly*, 187 Pa. St. 526, 534, 538, 539, 41 Atl. 523. And if the avoidance of the insurance is predicated upon the existence of a vacancy without anything more—not a vacancy continuing for so and so long, but the bare fact that the building is or becomes vacant, when in point of fact it was insured as a vacant building, so that, if the provision is enforced the policy must be regarded as void ab initio, it necessarily follows that it must go by the board as a whole; because to deny it the effect of destroying the policy from its inception, and yet permit it to stand to the extent of avoiding the insurance if the vacancy be continued beyond a period the court might deem reasonable, would be, not to construe a contract made by the parties, but ⁵³ to make a new one for them, which is a thing the court will not do: *Weaver v. Shenk*, 154 Pa. St. 206, 26 Atl. 811. Such a stipulation being thus wholly eliminated and the contract standing as one of insurance upon a vacant building, or perhaps more accurately upon a building which the insured might or might not occupy as he chose, it further follows with logical necessity that, if he tenant it for a time, the occurrence of a vacancy by the removal of the tenant, or any number of subsequently recurring vacancies, can have no bearing whatever upon the liability of the company: *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243, 12 N. E. 609; *Aurora Fire etc. Ins. Co. v. Kranich*, 36 Mich. 289; *Commercial Ins. Co. v. Spanneble*, 52 Ill. 53, 4 Am. Rep. 582. The building being in the same condition as regards occupancy, in which it was when insured, and the company having presumably been paid for assuming the risk incident to that condition, it has nothing to complain of, and is bound to stand by its bargain. See for a recognition of the general principle involved in this proposition: *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 15

Am. St. Rep. 696, 18 Atl. 447; Gould v. Dwelling-House Ins. Co., 134 Pa. St. 570, 19 Am. St. Rep. 717, 19 Atl. 793; Weiss v. American Fire Ins. Co., 148 Pa. St. 349, 23 Atl. 991. But there is no inconsistency between an agreement to insure a presently unoccupied building and a condition annexed thereto, that (a) if it remain unoccupied for a period exceeding so and so many days, or (b) if, after having been occupied, it shall become again vacant and so remain for a similar period, the insurance shall, in either event, be thereby terminated. In order to do away with the obvious and indubitably lawful effect of such a condition, it is not enough to call attention to the subject matter of the contract, the circumstances surrounding and necessarily affecting it, and the self-evident object of the transaction, but it would seem indispensable to show either a distinct bargain to the contrary, sufficient in explicitness of terms and in clearness and weight of proofs to reform the policy (see Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609), or a subsequent waiver of the condition. The former, as defendant's counsel rightly insists, is not established in this case. Was there a waiver, or anything from which the jury, had the question been submitted to it, might have inferred a waiver of the condition with the effect of rendering the defendant company liable for the loss when it occurred? And right here let it be noted that a waiver by subsequent conduct of the ⁵⁴ right to insist upon a forfeiture of the insurance by reason of the continuance for more than ten days of a vacancy existing at the time of the issuance of the policy, but terminated before the occurrence of the loss, is not the same thing as a waiver in advance of the entire nonoccupancy clause by the mere fact of insuring an unoccupied building where that fact is inconsistent with some part of the clause; and that therefore such subsequent waiver of condition (a) in the provision of this policy does not necessarily carry with it a waiver of condition (b) becoming operative after the initial vacancy has ceased and the property has become occupied. In other words, it is clear that under this policy, the company, insuring a vacant house to be occupied within ten days, may consent to a postponement of its occupation to a date more than ten days beyond that of the issuance of the policy—may by its conduct after insurance waive its right to insist upon that limit for the termination of the vacancy existing at the time of the insurance—without thereby renouncing its right to avoid the policy

in case and on the ground of a new vacancy continuing for more than ten days.

It is held in *England v. Westchester Fire Ins. Co.*, 81 Wis. 583, 29 Am. St. Rep. 583, 51 N. W. 954, that the insurer of a vacant building subject to condition (a) need trouble himself no further about it, since a failure on the part of the insured to comply with the condition is not to be expected, and if it occurs, at once terminates all liability upon the policy; and hence, that the agent's knowledge, though imputed to the company, of the vacancy at the time of insurance is not notice of the continuance of the same state of things beyond the ten day limit, and the company's failure to object thereto or promptly avoid the insurance cannot be deemed a waiver of the condition. I have been unable to find a satisfactory answer to this proposition as ordinarily controlling. But suppose there is a distinction to be made between the ordinary case of a dwelling-house presently unoccupied and that of a newly finished one, never yet occupied and built to be sold. It may be that the latter ought not to be understood as intended to be immediately occupied, partly because of the known objections to occupying a house not sufficiently seasoned and partly because of the further fact that the sale of such a house is in general injured by a temporary occupation of it, destroying its character as a new house—a fact best understood by real estate agents, which business defendant's agents were engaged in when this insurance was placed by them. And it may be that a reasonable consideration of these circumstances, amounting to notice of a possible intention to disregard the limit of vacancy, should have led the defendant company, if it meant to insist upon the letter of condition (a) and at the same time deal with the plaintiff in perfect fairness and good faith (as insurance companies are held to do: *Earley v. Mutual Fire Ins. Co.*, 178 Pa. St. 631, 36 Atl. 195; *Hower v. Susquehanna Mutual Fire Ins. Co.*, 9 Pa. Sup. Ct. 153), to keep an eye upon the property and promptly advise him of the avoidance of his insurance, so that he might protect himself by other; and that its failure to do so during the continuance of the vacancy or subsequently while the house was tenanted ought in conscience to be deemed a waiver of the right to defend upon the ground of a breach of condition (a) after the lapse of over half a year and after the destruction of the property. Be that, however, as it may, what is there to show a waiver of the effect of the second vacancy, under condition

(b)? There is nothing in the charge which makes the verdict decisive upon this point, and therefore the reserved point is not to be treated as containing any statement upon it beyond the fact that there was a vacancy of more than ten days immediately preceding the fire. The question now is whether there is anything in the evidence which would warrant a finding that the defendant had waived the effect of this vacancy. For the purposes of this inquiry, the evidence of the plaintiff, with all the inferences legitimately to be drawn from it, must be taken as verity, together with the uncontradicted facts of the case. The latter then presents itself in this wise:

Defendant's agents were at the same time engaged in the business of real estate agents. As such they had the plaintiff's property upon their list for sale (not for rent). Plaintiff's tenant (who leased from plaintiff, not from defendant's agents), occupying the house from month to month, removed from it on March 29th, leaving the key with a third party previously agreed upon between him and plaintiff, and moving into a house he rented from defendant's agents. There is nothing to show that when they rented to him they knew he was occupying the ⁵⁰ plaintiff's property and that by his removal from it the same would become vacant. The plaintiff first heard of his removal some few days before April 16th or 17th, when he got the key. He then called upon defendant's agents and told them they had taken his tenant out of his house, whereupon they made a memorandum of some sort. There is no evidence that anything was said about the vacancy as affecting the insurance, or that the company was notified of the vacancy. The plaintiff was actually unaware of the policy's provision concerning vacancies until after suit was brought, he being unable to read. The house remained unoccupied up to the time of the fire, which occurred on April 23d.

Were it shown that when defendant's agents had charge of plaintiff's property for the purpose of renting and not merely of selling, or that when they rented to plaintiff's tenant they knew, or ought to have known, that he was such, the case might be different from what it is. The contention of the defendant that even such knowledge, acquired in their business as real estate agents, would not be notice to them as insurance agents seems to rest upon a distinction belonging to that class which, in *Smith v. Northwestern Mut. Life Ins. Co.*, 196 Pa. St. 314, 319, 46 Atl. 426, Mr. Justice Brown declares to be "too refined for judicial approval," and which Lord Eldon, in

Ex parte Bennett, 10 Ves. 381, 399, pronounces "too thin to form a safe rule of justice." Nor does it find countenance in the decision relied upon by defendant's counsel in *Davey v. Glens Falls Ins. Co.*, Fed. Cas. No. 3590, 9 Ins. L. J. 497, for there the company's agent was at the same time in charge of the property insured as the agent of the owners, and his knowledge in the latter capacity that it had become vacant is treated by Nelson, J., as notice of that fact to him as agent of the company. But for aught that appears in the testimony (and the plaintiff cannot have the benefit of an unproved fact material to his recovery the same as if it had been proved: *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53, 22 Atl. 681), the defendant's agents were not apprised of the vacancy until it had existed for more than ten days, i. e., until the policy was void under condition (b), which is not abrogated, of course, by plaintiff's inability to read, in the absence of proof of any fraudulent trick or device practiced upon him to induce his acceptance of the policy without having it read and explained to ⁵⁷ him: *Weller's Appeal*, 103 Pa. St. 594; *Johnston v. Patterson*, 114 Pa. St. 398, 6 Atl. 746; *Lett v. Kunkle*, 178 Pa. St. 273, 35 Atl. 960. In these circumstances, quite apart from any question of the agent's power to waive a forfeiture already complete, it is certainly true that their mere silence, their omission to notify the company of the vacancy and its failure to advise the plaintiff of the lapse of the policy, cannot be construed into a waiver thereof: *Titus v. Glenn Falls Ins. Co.*, 81 N. Y. 410; *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354, 16 N. E. 229.

There thus appears to be no escape from the conclusion that there can be no recovery against the defendant under this policy, and, therefore, the rule for a new trial is discharged and the rule for judgment non obstante veredicto is made absolute.

Isaac Hiester, A. S. Strunk, and D. Nicholas Schaeffer, for the appellant.

Cyrus G. Derr, for the appellee.

⁵⁸ PER CURIAM. The judgment in this case is affirmed on the opinion of the learned judge of the common pleas.

Insurance.—The signification of "vacant and unoccupied premises," as used in insurance policies, is considered in the monographic note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 390-398. Conditions against the vacancy of buildings are construed strictly and most strongly against the insurer: *Moody v. Insurance*

Co., 52 Ohio St. 12, 49 Am. St. Rep. 699, 38 N. E. 1011; and the fact of vacancy does not per se annul the contract: Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936. A policy is forfeited if the tenant in possession vacated the building a short time before the loss, and it was not subsequently occupied: Stoltenberg v. Continental Ins. Co., 106 Iowa, 565, 68 Am. St. Rep. 823, 76 N. W. 835.

FLACCUS v. SMITH.

[199 Pa. St. 128, 48 Atl. 894.]

INJUNCTION—ENTICING APPRENTICES TO JOIN A LABOR UNION.—One has a right to employ persons who do not belong to a labor union, and to adopt a system of apprenticeship which excludes his apprentices from membership in such a union. Hence, if any person with knowledge that the employer has contracted with his apprentices not to join a labor union, interferes with his business, by enticing his apprentices to violate their covenant with him by joining a labor union, the act is unlawful and may be restrained by injunction, where it threatens irreparable injury. (pp. 781, 782.)

Bill in equity for an injunction, brought by Flaccus against Smith and others. The injunction was issued and the defendants appealed.

Johns McCleave, D. T. Watson, and W. J. Brennen, for the appellants.

J. S. Ferguson and E. G. Ferguson, for the appellee.

123 BROWN, J. The appellee is the proprietor of glass-works at Tarentum, in the county of Allegheny. In his complaint he sets forth that he has been engaged in the business of manufacturing glass bottles of various kinds, and, in and about their manufacture, has been compelled to employ divers workmen and apprentices; that the appellants and others are members of an association known as the American Flint Glassworkers' Union, affiliated with the American Federation of Labor; that for a long time prior to the year 1894 he had been greatly hampered and annoyed in his business by the control sought to be exercised over his workmen and apprentices by the said American Flint Glassworkers' Union and the American Federation of Labor, with which it is affiliated; that in the year 1894 he established his factory on an independent basis, employing no workmen or apprentices who were connected with either of the associations named, and expressly

requiring his said workmen and apprentices not to be connected with the said American Flint Glassworkers' Union, and, from that time until the filing of his bill of complaint, he had conducted his factory as an independent one, with mutual satisfaction to himself and the men and apprentices employed by him; that the appellants knew his factory was so being conducted as an independent one, and that his workmen and apprentices were not connected with the said American Flint Glassworkers' Union, and had agreed not to connect themselves with the same, and particularly that his apprentices were under agreement not to so connect themselves; that his workmen and apprentices were working in harmony until about September 15, 1899, when the said appellants, acting under orders of the said American Flint Glassworkers' Union, claiming the right of declaring strikes and otherwise interfering with the employment of labor, well knowing that his apprentices were under covenant and agreement not to be connected with the said American Flint Glassworkers' Union, began to entice, and did entice, a number of them to break their ¹³⁴ covenants or agreements and to become members of the said union, and to become subject to the orders thereof, paramount to his orders as their employer; and that the appellants, by so enticing and endeavoring to entice his apprentices to break their covenants with him by becoming members of the said union, have done that which is contrary to equity, for which he has no adequate remedy at law. On the answer to the appellee's bill of complaint, and upon testimony taken, the court below found that Skelley, one of the appellants, had gatherings of the apprentices of the appellee at his room in a hotel and persuaded them to join the union referred to; that he knew the character of the appellee's works as an independent factory, in which members of the union were not employed, and that his apprentices were bound in their indentures not to join or become subject to the rules or regulations of any such organization as he represented; that he knew these facts at the time he swore in these apprentices as members of the union; that the apprentices who joined the union violated the covenant of their indenture, and subjected themselves to the orders of the union, which made obedience to it paramount to obedience to their employer; that the object of Skelley was to break down the appellee's factory as a nonunion factory, either by preventing the operation of his works or compelling him to join the union; that the apprentices who joined the

the union, enticed and persuaded so to do by Skelley, violated an express covenant of their indenture, which was one of great importance to the appellee, and Skelley so knew at the time he so enticed them; that Skelley's conduct and actions were very injurious to the appellee and his business, and if repeated and persisted in, would in all probability utterly ruin his business; that Skelley's codefendants, by their counsel, openly and boldly justified him in all he did, contending that, as an officer or agent of the union, he had a perfect right to interfere with plaintiff's apprentices, persuade them to join the union, and secretly swear them in as members; that if the union had that right, either Skelley or some other agent could go to Tarentum at any time and interfere with the appellee's apprentices and business until it would be destroyed. To this last finding there is no exception.

This is not a controversy between the employer and his employes, but between him and certain individuals associated as ¹³⁵ a labor union, unfriendly to the employment of independent labor, and seeking to induce the apprentices of the employer to violate the terms of their indentures with him. No question is here raised by the employer as to what his employes may or may not do, and the complaint sets forth no misconduct by them for which relief is asked. The appellants, outsiders, having no connection with the business of the appellee, are charged with enticing and endeavoring to entice the young men employed by him to violate the covenants of their apprenticeships with him, and protection is prayed for against the threatened ruin of his business, as found by the court below. Having reviewed all the evidence, we are not persuaded that any of the court's findings of fact ought to be disturbed, and, with them before us, the only question to be determined is, whether the injunction should go out.

In the several statutes called to our attention by the learned counsel for appellants, we can find nothing to aid us. The act of September 29, 1770 (1 Smith's Laws, 309), simply provides that a minor may enter into a valid contract of apprenticeship; by that of May 8, 1869 (Pub. Laws, 1260), the legislature properly declared that "it shall be lawful for any and all classes of mechanics, journeymen, tradesmen, and laborers to form societies and associations for their mutual aid, benefit, and protection, and peaceably meet, discuss, and establish all necessary by-laws, rules, and regulations to carry out the same"; and the act of June 14, 1872 (Pub. Laws, 1175), is that "it

shall be lawful for any laborer or laborers, workingman or workingmen, journeyman or journeymen, acting either as individuals or as the members of any club, society, or association to refuse to work or labor for any person or persons, whenever, in his, her, or their opinion, the wages paid are insufficient, or the treatment of such laborer or laborers, workingman or workingmen, journeyman or journeymen, by his, her, or their employer, is brutal or offensive, or the continued labor by such laborer or laborers, workingman or workingmen, journeyman or journeymen, would be contrary to the rules, regulations, or by-laws of any club, society, or organization to which he, she, or they might belong, without subjecting any person or persons so refusing to work or labor to prosecution or indictment for conspiracy under the criminal laws of this commonwealth." But nowhere does it appear in the foregoing enactments ¹³⁰ that these intermeddling appellants had warrant for their interference between employer and employed as charged in the complaint against them; and with no apprentice, even if he is to be regarded as a "laborer" or "workingman" within the meaning of the last two acts, complaining that his employer has denied him any right under either of them, further demonstration of the inapplicability of any one of these statutes to the question before us is certainly not needed.

The appellee had an unquestioned right, in the conduct of his business, to employ workmen who were independent of any labor union, and he had the further right to adopt a system of apprenticeship which excluded his apprentices from membership in such a union. He was responsible to no one for his reasons in adopting such a system, and no one had a right to interfere with it to his prejudice or injury. Such an interference with it was an interference with his business, and, if unlawful, cannot be permitted. The court found that the interference was injurious to him, and if allowed to continue would utterly ruin his business. The damages resulting from such an injury are incapable of ascertainment at law, and justice demands that specific relief be furnished in a court of equity. The test of equity jurisdiction is the absence of a plain and adequate remedy at law to the injured party, depending upon the character of the case as disclosed in the pleadings. If equity alone can furnish relief, the injunction must be issued: *Watson v. Sutherland*, 5 Wall. 79. With this test applied to the pleadings and the facts found by the learned judge in the court below, the decree which he made was proper. It is now

affirmed and the appeal from it is dismissed at the costs of the appellants.

Labor Union.—The law protects employers against the unlawful interference by trade unions with their right to employ whom they please and at such prices as they may: *Beck v. Railway etc. Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13.

Labor Unions—Injunction.—A general scheme of a union to compel the members of another union to desert it and become members of the former, and, if necessary to that end, to threaten employees and cause them to believe that there will be trouble if they continue their employment unless the members abandon their union and join the other, is unlawful, and the further prosecution of the scheme may be enjoined: *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 830, 57 N. E. 1011.

KOSTENBADER v. KUEBLER.

[199 Pa. St. 246, 48 Atl. 972.]

JUDGMENT BY CONFESSION—COLLATERAL ATTACK.

The record of the entry of a judgment by a prothonotary, under a power contained in the instrument on which judgment is confessed, is a record of the court, having all the qualities of a judgment on a verdict, and therefore not subject to collateral attack. (p. 788.)

JUDGMENT BY CONFESSION—COLLATERAL ATTACK.

IF THE ENTRY, by a prothonotary, of a confessed judgment, purports to have been made on a certain day, the record is conclusive when it is sought, in a collateral proceeding, such as an action of ejectment, to impeach the entry by showing that it was made on the next day. (p. 788.)

Ejectment for a hotel. The plaintiff offered to prove that the confessed judgment was entered in the office of the prothonotary at 4:18 o'clock, on April 27th, prior to the time which the defendant fixed as the date of the conveyance to him, but an objection to this offer was sustained. There was a judgment for the defendant, and the plaintiff appealed.

Russell C. Stewart, W. C. Glace, and P. C. Evans, for the appellant.

H. J. Steele and William Beidelman, for the appellee.

249 FELL, J. The plaintiff in an action of ejectment claimed title by virtue of a sheriff's sale under proceedings on a confessed judgment, which the record showed was entered April 27th. The defendant's title was obtained by deed from

the judgment debtor dated and delivered on the same day. At the trial the defendant was allowed to call the deputy prothonotary who made the record of the entry of the judgment, and to show by him that it was in fact made April 28th, although the judgment note was delivered to him at his office on the 27th. The court gave to this testimony the effect of making the conveyance prior to the lien of the judgment, and directed a verdict for the defendant.

The record of the entry of a judgment by the prothonotary under a power contained in the instrument is a record of the court, and it has all the qualities of a judgment on a verdict: *Braddee v. Brownfield*, 4 Watts, 474; *St. Bartholomew's Church v. Wood*, 61 Pa. St. 96; *Hageman v. Salisbury*, 74 Pa. St. 280. It imports absolute verity. The policy of the law will not permit the record of a court to be contradicted or impeached in a collateral proceeding. This principle is of almost universal application, and is too firmly established to admit of question: *Adams v. Betz*, 1 Watts, 425, 26 Am. Dec. 79; *Hoffman v. Coster*, 2 Whart. 453; *Morris v. Galbraith*, 8 Watts, 166; *McMicken v. Commonwealth*, 58 Pa. St. 213. In the case last cited it was said by Sharswood, J.: "The highest considerations of public policy require that the officer himself, to whom the law has intrusted the performance of a public duty and of the fulfillment of which a record has been made, should not be permitted to open his ²⁵⁰ mouth to impeach it, and thus to admit himself guilty of official misconduct or of crime."

A number of other questions are suggested by the record of the case, but they are not raised by the assignments of error, and are not before us. What we now decide is that the record of the entry of the judgment of April 27th was conclusive on all parties at the trial.

The judgment is reversed with a *venire facias de novo*.

Judgment.—In any collateral proceeding it must be conclusively presumed that every entry made in the records of a court is a statement of the action of the court, and was made by its direction and authority: See the monographic note to *Haven v. Owen*, 80 Am. St. Rep. 490. Consult, also, the extended note to *Morrill v. Morrill*, 28 Am. St. Rep. 104-119.

KAISER'S ESTATE.

[199 Pa. St. 269, 49 Atl. 79.]

HUSBAND AND WIFE—DEED OF SEPARATION WITHOUT WIFE'S ACKNOWLEDGMENT.—A deed of separation between husband and wife is binding on both parties thereto, and bars her right of dower in his real estate, without any separate acknowledgment by her, where the separation is actual and immediate, based upon a good consideration and upon terms advantageous to her, and is carried into effect by the parties. (pp. 785, 786.)

Petition for partition.

J. F. Strieby, for the appellants.

Seth T. McCormick, W. W. Champion, and Henry C. McCormick, for the appellee.

²⁷⁰ **MESTREZAT**, J. George J. Kaiser and his wife, Catherine, by a contract dated August 15, 1893, agreed to separate and thereafter "to live apart as though they had never been married." This contract was signed, sealed, and acknowledged by the parties before an alderman. There was, however, no separate acknowledgment by the wife as required by the act of February 24, 1770 (1 Sm. L. 307, Purd. 632, pl. 22), when she conveys her interest in real estate. By this agreement Kaiser covenanted to pay his wife five hundred dollars, and to give her all her personal property in their residence, and released his interest in all the personal property and real estate of which she was then, or thereafter should become, possessed. As a consideration therefor Mrs. Kaiser agreed to leave her husband's residence at once and to forever remain away, "and, further, that she hereby releases and by these presents ²⁷¹ has released all rights that she may have become possessed of by the aforementioned marriage, in any property, money, or other valuable thing, either real or personal, that he may be possessed of at this time, or that he may become possessed of in the future, the same as though the aforementioned marriage had never taken place." Kaiser paid his wife the five hundred dollars and she took possession of her own personal property. She left his residence at once and thereafter they remained apart. On January 5, 1899, he died, leaving a will, dated April 17, 1885, in which he disposed of all his property. Mrs. Kaiser, alleging that she was entitled to dower in his real estate, presented her petition to the court below on May 3, 1899, and

prayed the court to award an inquest to make partition of the lands of which her husband died seised. The right of the widow to partition was resisted by the devisees under the will of the testator and by his executor on the ground that her right of dower in her husband's real estate was barred by the deed of separation. The learned judge of the orphans' court so held, and entered a decree refusing to award an inquest. This decree was reversed by the superior court, and from its decree this appeal was taken.

The only question for consideration here is whether a deed of separation under the facts of this case will bar the widow's right of dower in the absence of a certificate of an acknowledgment made by her in accordance with the act of 1770. The superior court held that it would not have that effect. It is maintained in support of this position that the reasons requiring a married woman's compliance with the act of 1770 to make a valid conveyance of her real estate apply with equal force when she and her husband execute an agreement of separation. It is well settled by numerous decisions in this state that a contract of this character is binding on both parties. To give it validity, however, as against the wife it must contemplate an actual and immediate separation, must be based upon a good consideration and be reasonable in its terms, and must in good faith be carried into effect by the parties. Such deeds of separation are effective both at law and in equity, and will be enforced according to their terms. This is unquestionably the law of the state as established by the decisions of this court. The reason of the rule is apparent from these decisions. In none of the adjudicated cases is the validity of the deed made ²⁷² to depend upon the separate acknowledgment of the wife. In *Walsh v. Kelly*, 34 Pa. St. 84, the necessity for the wife's separate acknowledgment when she disposes of real estate is referred to, but there were other controlling reasons in that case for the court refusing to enforce the agreement. Such deeds are obligatory upon the husband and their provisions are enforceable against him and his estate. As has been said, mutuality is the essence of equity. The reason, therefore, for the enforcement of the contract against the wife is that it would be manifest injustice and violative of every principle of equity to permit her to disregard and annul the agreement freely made by her for a good consideration and upon terms advantageous to her. She cannot retain the benefits of the transaction and repudiate her covenants given as a consideration for them.

Equity turns her away from its door and refuses its assistance in obtaining for her the fruits of a violated agreement. This is the effect of her deed, regardless of the acknowledgment. It is not the form or character of the acknowledgment of the contract, but the solemn covenants which she assumes in sealing the instrument and accepting its benefits that give it life and prevent her from repudiating it. Against the provisions of such a contract, she cannot invoke the aid of the statute of 1770 to enable her to perpetrate a fraud on the other party to the agreement. Equity and good conscience forbid it.

Mrs. Kaiser has no legal or equitable grounds on which she is entitled to dower in her husband's real estate. We must assume that she was quite as willing and anxious for the separation as her husband. After a shortly wedded life, unhappy differences arose between them and she and her husband concluded, for various reasons, "to live separate and apart the same as though we never had been married." There is no allegation of bad faith or coercion of the wife by the husband in procuring the deed of separation. Nor is it alleged that the agreement was unreasonable in its terms or was not advantageous to the wife. It is not denied that it was carried into effect by both parties in good faith, and that there was an actual and immediate separation of the parties which continued during the remainder of the life of Mr. Kaiser. These facts bring the case within our decisions sustaining the validity of such agreements, and require us to enforce Mrs. Kaiser's covenants against her.

273 It follows that the learned judge of the orphans' court was right in refusing to award an inquest for partition on the application of Mrs. Kaiser, and his decree should have been affirmed by the superior court.

The decree of the superior court is reversed at the costs of the appellee, and the decree of the orphans' court of Lycoming county is affirmed.

Husband and Wife.—An agreement between husband and wife for separation may be valid: *Clark v. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. 1111. See, too, *Henderson v. Henderson*, 87 Or. 141, 82 Am. St. Rep. 741, 60 Pac. 597, 61 Pac. 136. She may contract for the relinquishment of her dower right: *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463.

Acknowledgments of Married Women are considered in the notes to *American Freehold etc. Co. v. Thornton*, 54 Am. St. Rep. 154, 155; *Pickens v. Knisely*, 6 Am. St. Rep. 642, 643.

Dower.—On the effect of deeds releasing dower, see the extended note to *Trimble v. State*, 57 Am. St. Rep. 170-172.

TREAT v. PENNSYLVANIA MUTUAL LIFE INSURANCE COMPANY.

[189 Pa. St. 326, 49 Atl. 84.]

RECEIVERS—EFFECT OF APPOINTING.—The appointment of a receiver for a corporation is a suspension of its functions and authority over its property and effects, and is equivalent to an injunction to restrain its agents and officers from intermeddling with its own property in any way. (p. 789.)

EQUITY—BILL AGAINST INSURANCE COMPANY FOR A RECEIVER—PRAYER FOR INJUNCTION—NECESSITY OF.—When a certificate holder of a mutual life insurance company brings a bill against it for a receiver, the prayer thereof is not defective because it fails to ask for an injunction. (p. 789.)

EQUITY—BILL AGAINST INSURANCE COMPANY FOR A RECEIVER—COMMISSIONER NOT A NECESSARY PARTY.—When a certificate holder of a mutual life insurance company brings a bill against it for a receiver, he need not join the insurance commissioner as a defendant, where it is not alleged that the company is insolvent, or that its business should be discontinued and its corporate existence cease. (p. 789.)

EQUITY PLEADING AND PRACTICE—BILL FOR RECEIVER—DEMURRER.—When a certificate holder of a mutual life insurance company brings a bill against it for a receiver, an objection that no injunction is prayed for, and that the insurance commissioner should be made a defendant, ought to be disposed of on demurrer. It is too late, after an answer and trial, to urge that such matters render the bill defective. (p. 790.)

Bill in equity for a receiver. It was dismissed, and the plaintiff appealed.

John J. Ridgway and Thomas Ridgway, for the appellant.

Alexander Simpson, Jr., and Joshua R. Morgan, for the appellee.

320 MESTREZAT, J. This bill was filed by the plaintiff for himself and such other certificate holders of the defendant company as might join therein, alleging mismanagement and a conversion of the assets of the company to the use of owners of a majority of the shares. The bill prayed "that a receiver be appointed by your honorable court to take charge of the books and assets of said company, to recover all amounts due said company, . . . to pay its obligations, and generally to perform such matters and things in connection with the continuance or dissolution of said corporation as may seem requisite and proper to this court." The defendant filed an answer, issue was joined, and the cause was regularly tried

under the equity rules. The relief prayed for was denied and the bill was dismissed because (a) the prayer for relief is defective in not asking for an injunction, and (b) the bill is fatally defective in not joining as a party defendant the insurance commissioner of Pennsylvania. The learned judge therefore held that for these reasons the merits of the cause need not be considered.

The first reason assigned for the action of the trial court is founded on a misapprehension of *Schlecht's Appeal*, 60 Pa. St. 172. In that case an injunction had been granted and a receiver had been appointed. This court reversed the court below because the plaintiffs had an adequate remedy at law. It was contended by the plaintiffs that this court could only reverse the decree for an injunction, and could not interfere with the order for the appointment of a receiver. It was held, however, that the decree was a unit, and that the appointment of a receiver was but ancillary to the injunction. That was clearly correct. But it was not decided that a receiver could not be appointed without granting an injunction, and that a bill would be defective without a prayer for an injunction. On the contrary, Judge Sharswood delivering the opinion holds that the ³³⁰ prayer for a receiver is in effect a prayer for an injunction. He says: "Indeed, the order for the receiver is itself an injunction—it directs the tenants to attorn and pay the rents to him [the receiver], giving him full authority to lease and manage the property." The appointment of a receiver is given like effect in *Gravenstine's Appeal*, 49 Pa. St. 310, where it is said in the opinion of the court that, "the appointment of a receiver was a suspension of its [the company's] functions and authority over its property and effects, and was equivalent to an injunction to restrain its agents and officers from intermeddling with its own property in any way." Such is the effect of placing the property of a corporation in the hands of a receiver. He has the full control and management of it, and all other parties are necessarily restrained from interfering with it. It follows that the prayer of the complainant's bill was not defective because it did not ask for an injunction.

Nor is there any merit in the suggestion that the bill is defective because it does not join the insurance commissioner as a defendant. This is based upon a misconception of the object and the prayer of the bill. There is no allegation that the defendant company is insolvent, nor that its business should be

discontinued and its corporate existence cease. It is averred, however, that its affairs are mismanaged, and that its assets are being squandered and converted to the use of those who have control of the company. The bill, therefore, prays that the affairs of the company be placed in the hands of a receiver, who shall "perform such matters and things in connection with the continuance or dissolution of said corporation as may seem requisite and proper to this court." This is a contest among the certificate holders of a solvent company wherein the mismanagement of its affairs by the majority certificate holders is alleged, and relief from which is sought in the proceeding. There is no necessity, under the facts averred in the bill, for the insurance department to interfere with the business of the company, and it has accordingly declined to do so. Nor need the insurance commissioner be made a party defendant in this action. The act of April 4, 1873, requires him to be made a party to the proceeding only when it is "instituted for the purpose of closing up the affairs of any company." Such is not the purpose of this bill. On the contrary, the plaintiff desires the ³⁸¹ continuance of the corporation and its business, and believes that an honest and faithful administration of its affairs will result in the success of the company. With this object in view, the bill prays for a receiver to take charge of the books and assets of the company and manage its affairs. The act of 1873 has no application to a case of this character.

There is another sufficient reason why the defendant cannot set up as a defense the matters suggested by the court below. If they have any merit, they should have been disposed of on a demurrer. The defendant filed an answer and the case was tried by the court on its merits. The pleadings do not raise the question suggested in the adjudication. It is now too late for the defendant to avail itself of the alleged defectiveness in the bill.

The assignments of error are sustained, the decree is reversed, and the bill is reinstated with a procedendo.

Receivers—Appointment of.—The grounds upon which a receiver may be appointed are considered in the monographic note to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 29-97. The effect of his appointment is considered in the monographic note to *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 352-354.

STAHLER v. PHILADELPHIA AND READING RAILWAY COMPANY.

[199 Pa. St. 383, 49 Atl. 273.]

NEGLIGENCE CAUSING PARENT'S DEATH—PECUNIARY BENEFIT TO ADULT CHILDREN—DAMAGES.—Under the statute of Pennsylvania, adult children may recover damages for their parent's death caused by another's negligence, though they are benefited thereby through inheriting a large estate, and its amount, therefore, is not admissible in evidence for the defense. (p. 792.)

Trespass to recover damages for death. The trial court refused to admit various offers of testimony to prove the amount of money or property which the plaintiffs had received from their father's estate. There was a judgment for the plaintiffs and an opinion as follows by

³⁸³ **WEAND, J.** William Stahler was killed in a railroad accident on defendant's road. It is admitted that his death was caused by the negligence of the employes of the defendant company. The deceased resided in Norristown, where he carried on a large wholesale and retail drug business, and an agency for the ³⁸⁴ sale of powder. He owned real estate in Norristown and Bridgeport. He had been in excellent health and at the time of his death was seventy-three years of age. He left surviving him no widow, but three adult sons, who are the plaintiffs in the suit, and who ask damages for the loss which they have sustained by reason of the death of their father.

The case was tried according to the principles laid down in *Pennsylvania Railroad Co. v. Adams*, 55 Pa. St. 499.

"The rule is that if there be a reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning the death of the party from whom it arose, will sustain the action: *Schnatz v. Philadelphia etc. R. R. Co.*, 160 Pa. St. 602, 28 Atl. 952. The act of April 26, 1855 (Pub. Laws, 309), relating to damages for accidental death, makes no distinction between children over age and those under, between those married or single, between those having homes and families of their own and those still members of the parent's household. If children, although not living with their parent, have a reasonable expectation of pecuniary advantage from the

continued life of the parent, they are entitled to recover damages for such loss."

The plaintiff's testimony showed conclusively that the deceased had for about ten years contributed in the aggregate to the three sons about two thousand five hundred dollars yearly, and the jury were instructed in the exact language of the decisions as to what was necessary to be found by them in order to entitle plaintiffs to recover.

No fault is found with the charge of the court or the amount of the verdict if the plaintiffs are entitled to recover; but the broad ground is taken that if plaintiffs were benefited by their father's death, by inheriting his estate, they can have suffered no loss, and that, therefore, evidence should have been admitted on part of defendants to prove what the sons inherited from their father's estate to show that what they thus received after death exceeded that received before.

The question arose on offers by defendant to show the appraisement of the estate, the will of decedent, and by direct questions to each plaintiff of what he had received from the estate. The sole object of the testimony was to show a large estate left by the deceased, and that the present worth of the inheritance ²⁸⁵ exceeded the amounts received in the lifetime of the parent. All these offers were rejected, as were also points submitted raising the same questions. As there was no testimony allowed to sustain the points, they were, of course, refused.

It claimed by defendant's counsel, who have so ably and earnestly argued this question, that no case in our own courts rule the point, and that we have laid down a new and dangerous doctrine. We did not think so at the trial, and are still of opinion that we are sustained by reason, common sense, and decisions of the highest court of the state. Conceding the right to recover if a loss is sustained, how do we ascertain what is a loss, in the sense contemplated by the act? A son who is receiving nothing from his father living may be said to be benefited pecuniarily by the parent's death, but we have yet to learn that a railroad company by negligently causing death can in this way become the gratuitous and unsolicited benefactor of children, who prefer their father living; and it is a novel proposition that a yearly allowance with a certainty of an inheritance of an estate constantly increasing in value by the parent's prudence and financial ability can be cut off by the killing of the parent, and the children be told that it is for their benefit. If

this is the law, what security have the wealthy against the negligence of others? All inducements for the use of care and caution as to such are removed. The only reasons why a verdict in pure negligence cases can be justified are as an inducement appealing to self-interests to use care and caution, but these are taken away if we hold that no damages can be recovered by the children of wealthy people because they get the estate as a result of the unlawful act. As the jury were told, at request of defendant, that nothing could be allowed for the suffering of the deceased or the feelings of the surviving members of his family, and if in addition we hold that nothing can be recovered for the reason now urged, the defendant, although confessedly guilty of negligence resulting in death, suffers no loss or punishment for its unlawful act, simply because of the financial standing of the deceased. If this is law it might be well for the legislature to provide a new criminal offense and substitute imprisonment for damages, and thus induce the same degree of care and caution in the transportation of the rich as of the poor.

386 It is not, however, absolutely correct to say that the mere fact of coming into the inheritance presently is a benefit pecuniarily, for non constat that if the life had been prolonged but a week or a month that the estate would not have been larger.

The true question is, What had these plaintiffs the right to expect to receive from the parent during his life? And for the loss of this they are to be compensated; what they got after his death does not enter into the case. The loss spoken of is the taking away of that which they were receiving and would have received had he lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation. To say, "true it is we have taken from you his benefactions, but you get by law, not from us, but from his estate which we thus make available for you, something better," is to substitute the heirs' legal right under the law for the company's liability.

We think, however, that the question was squarely decided in *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St. 15, where it was endeavored to be shown that a father suing for the death of his adult son had been benefited by reason of having a policy of insurance on his son's life. The offer was rejected, the court saying: "The admission of this testimony would have been a violation of what is understood to have been the principles of

construction uniformly applied to the acts of 1855 and 1868." Counsel have endeavored to draw a distinction between an insurance and an inheritance, but we can see no difference in the application of the principle.

The language of Justice Thompson in *North Pennsylvania R. R. Co. v. Robinson*, 44 Pa. St. 175, is directly in point. The point was made that none may recover in a join action but such as are injured by the death. "If such be the rule, we should have the indecent spectacle of an investigation whether the loss of a parent or child was or was not in fact an advantage rather than a loss; for certainly, if none be allowed to recover but such as are able to show a pecuniary loss, the defendants would, with great apparent reason at least, be entitled to claim the right to prove the contrary, and to show peradventure that, by the death, the party suing may have succeeded to an estate, or, on the other hand, had been relieved from the burden of maintenance." In case of the death of aged persons or helpless infants, we might expect in the application of such a rule to have the point discussed, whether the death was an actual loss or gain. The law does not open the door to anything so shocking." This is what defendants are attempting now to show, that the death of the father was a gain to the sons in direct violation of the cited decisions.

To the same point is *Pennsylvania Railroad Co. v. Keller*, 67 Pa. St. 300, where Thompson, C. J., said: "But there is another aspect of it which will result from the principle insisted upon, viz., that the test of the right to recover being the 'pecuniary damages clearly proved to have been suffered,' it will follow that all those who from youth, old age, or other circumstances are nonproducers, may become the victims of negligence without any compensation to survivors. Nay, more, the corollary of the postulate would prevent compensation where the survivors are absolutely benefited by the death, either as gainers by a distribution of the property of the deceased, or by the riddance of a troublesome charge. The controversies which would arise if this were the rule would be repugnant and offensive to the sensibilities of every person."

In *Coulter v. Pine Township*, 164 Pa. St. 543, 30 Atl. 490, the court said: "The assignment of error to the withdrawal of the evidence as to the insurance on the life of Joseph Coulter cannot be sustained. There was no basis upon which such evidence could be admitted. Money paid on a policy of insurance is not the pecuniary value of the life, but of the premiums

paid. The evidence was entirely irrelevant to the liability of defendant or its amount: *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St. 15. Appellant cites the authority of Lord Campbell from *Sedgwick on Damages*, but the eighth edition of that work, section 67, discusses the subject more fully and concludes thus: "The amount received by the plaintiff on an insurance policy cannot be shown to reduce the damages. When an action is brought under a statute for damages causing death the rule in England is different. . . . In the United States, however, the ordinary rule is followed, and the amount recovered is not reduced by the amount of insurance money": Citing *Sherlock v. Alling*, 44 Ind. 184, 189; *Althorf v. Wolfe*, 22 N. Y. 355; *Terry v. Jewitt*, 17 Hun, 395; *Harding v. Townsend*, 43 Vt. 536, 5 Am. Rep. 304."

§§§ The industry of counsel has enabled them to find cases in England and in some of our own states which might throw some doubt upon the question, but we prefer to rely upon the decided utterance of our own supreme court as furnishing a safe rule and being founded upon equity, justice, humanity, and good common sense. It would be a waste of time, therefore, for us to attempt to analyze and distinguish the authorities cited by defendant, being of opinion that they are not applicable to the case in hand. It is claimed that all the cases cited by us are mere dicta not binding upon us or the higher court. But even if so regarded we think they express the true thought of the court and the spirit of the law, and clearly foreshadow what will be, if not already, pronounced as the rule governing cases of this nature.

And now, November 23, 1900, the motion for a new trial is overruled.

The defendant appealed.

Charles Heebner and James Boyd, for the appellant.

N. H. Larzelere and William F. Dannehower, for the appellees.

§§§ PER CURIAM. The judgment is affirmed on the opinion of the court below refusing a new trial.

Death of Parent.—That children are adult and self-supporting does not necessarily preclude a recovery by them for pecuniary loss consequent upon a parent's death: See the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 674.

FAHRIG v. SCHIMPF.

[199 Pa. St. 423, 49 Atl. 237.]

ADMINISTRATOR'S SALE UNDER ORDER OF COURT—CONFIRMATION—EFFECT OF.—Upon a sale by an administrator the liability of the purchaser is fixed by the return and confirmation. He cannot thereafter claim either a failure of title, misrepresentations by the administrator, or other matter attacking the validity of the sale. (p. 796.)

ADMINISTRATOR'S SALE, PURCHASER CANNOT QUESTION AFTER CONFIRMATION.—If a sale by an administratrix has been confirmed, the purchaser cannot, in an action by her to recover the amount of his bid, set up as a defense that he purchased at her personal solicitation, and was only to be accountable to her for what he realized upon a resale of the property. (p. 798.)

Assumpsit brought by an administratrix to recover the amount of a bid offered at a sale made by her, under order of court, for payment of the decedent's debts. The defendant contended that he had purchased as stated in the opinion. There was a judgment for the plaintiff and the following opinion by

424 **ARCHBALD, P. J.** Upon the sale by an administrator under order of court for payment of the debts of a decedent, the liability of the purchaser for the amount of his bid is fixed by the return and confirmation, and he cannot set up in an action to enforce it either a failure of title, misrepresentations by the administrator, or other matter attacking the validity of the sale. His day in court to make such objection is at the return of the sale, and if he submit to the decree of the court confirming it, he cannot afterward be heard against it collaterally. This is decided in numerous cases, a few of which only need be referred to.

Bashore v. Whisler, 3 Watts, 490, was an action on a bond given by a purchaser at such a sale. To defeat a recovery the purchaser set up a defect in the title as well as misrepresentations by the administrator as to the effect of the sale, but it was held that neither was admissible. Fox v. Mensch, 3 Watts & S. 444, was a case of similar character, the defense, as in the other being that the defendant was induced to purchase by the misrepresentations of the administrator, and the same ruling was again made. "If the purchaser has a complaint," says Sergeant, J., "he ought to make it to the orphans' court before confirmation. Nor are the representations of the administrator to the purchaser in relation to the property relevant.

As is said in *Bashore v. Whisler*, 3 Watts, 490, it was the folly of the purchaser to repose confidence in his opinion or promise. He is the agent of the law, acting in a prescribed path, and any representations out of that are beyond the scope of his authority and the representatives of the deceased are not bound by it." *Miles v. Diven*, 6 Watts, 148, was also an action by an administrator for purchase money. The purchase was of two hundred and forty-one acres at eighteen dollars an acre, the purchaser claiming that he was misled by the statement of the administrators, with whom he had gone upon the property prior to the sale, that no part of it was mountain land. This was a mistake, forty acres of it in fact being of that character, and the purchaser took, relying on the representations otherwise, but it was held that he could not be relieved from his bargain. *King v. Gunnison*, 4 Pa. St. 171, was also an action for the amount of a bid, and again the decree was held conclusive upon the purchaser. "When the ⁴²⁵ sale is confirmed by the court," says Coulter, J., "the amount bid becomes due from the bidder." In *Vandever v. Baker*, 13 Pa. St. 121, one of the conditions fixed by the order was that the sale was to be made subject to the lien of an existing dower mortgage, but the defendant, who was the purchaser, was permitted to prove that after the conditions were read the crier stated that bidders would only have to pay what they bid, and that the amount of the mortgage would be deducted, and that this was the clear understanding of all who attended the sale. In declaring this to be inadmissible it is said: "It has been ruled more than once in this court that an administrator making a sale for the payment of debts was merely the instrument of the court for effecting the purpose of the law. . . . In every contract there must be persons capable to contract; but what authority has the crier of a judicial sale to make a contract to bind the creditors and the heirs? They are represented by the court at whose order the sale is made; they make the conditions of sale." And again: "The declarations of the crier after he had publicly read the conditions of sale in direct hostility to them were not evidence. If the purchaser was misled by these declarations he had his day in court for relief; he might have applied to the court to set the sale aside and not confirm it to his prejudice. It is alleged that he was not bound to do this because the return was the act of the administrator alone; he was, however, bound to do so." Similar doctrine appears also in *Sackett v. Twining*, 18 Pa. St. 199, 57 Am. Dec. 599, where the purchaser bought by

the acre so many acres at so much per acre, with leave, however, to resurvey the land at his own expense. Without availing himself of this privilege he allowed the sale to be returned at the acreage named by the administrator and accepted a deed based upon it. To a judgment given for the balance of purchase money he interposed the defense that on a resurvey afterward the land fell short some five or six acres. With regard to this the court says: "We cannot overturn or impugn the decree of the orphans' court confirming the sale in this collateral proceeding. It was a judicial sale; as an individual the administrator had no authority whatever to make the sale. But as an officer of the court for that purpose he had, and if the court approved of his proceedings and confirmed the sale it became valid and binding except for fraud, in all ⁴²⁸ collateral proceedings. The decree of confirmation fixed the administrator for the amount of the purchase money for which he was accountable to the heirs and which he was bound to distribute under the direction of the court according to law. He has, therefore, a clear right to recover it from the purchaser."

Other cases of like import could be cited, but these are enough, and they abundantly support the position taken at the trial. To relieve the defendant from his bid it was sought to be shown that he purchased at the solicitation of the administratrix personally, and was only to be accountable to her for what he realized upon a resale of the property. If such an arrangement was made by which the administratrix through his intervention was the real purchaser, that is a personal matter between the two; it was a fraud upon the estate to make it, legally, if not by intention, for which the sale at the instance of those interested could have been set aside: *Hannum's Appeal*, 2 Penny. 103; *Myer's Estate*, 9 Pa. C. C. R. 439; but the defendant was a party to it; even had he applied before the sale was confirmed, could hardly be heard to do so; much more can he not now, when the whole proceeding has been closed and consummated. The undertaking which the defendant assumed in becoming the purchaser, as between himself and the parties directly interested in the estate, was conclusively fixed by the decree of confirmation, and from that he cannot escape. The administratrix, in that capacity, is the representative of the estate and is entitled to the sum bid; for that she must account, and the defendant is bound to pay it. It is no answer to suggest that he assumed to act at the solicitation of the administratrix, and for her individual benefit. If he did, any remedy

which he has is against her personally; he can get no relief in this action. The money due from him represents the property sold which was an essential part of the decedent's estate, and the parties to whom it is to go on distribution are entitled to the payment now demanded.

The rule for a new trial is discharged.

Defendant appealed.

J. H. Torrey, Joseph O'Brien, C. H. Welles, and M. J. Martin, for the appellant.

Charles H. Soper and George S. Horn, for the appellee.

427 PER CURIAM. This was an action of assumpsit in which the plaintiff recovered a verdict of two thousand and ninety-four dollars and forty cents against the defendant. The verdict was warranted by the testimony in the case, and the charge of the court was plain and impartial. There does not appear to be any ground for a new trial or a reversal. The opinion refusing a rule for a new trial contains a citation of the cases applicable to the issue, and they seem to support the judgment founded upon the verdict. We therefore dismiss the specifications of error and affirm the judgment on the clear and satisfactory opinion of the learned president judge of the common plea.

Judicial Sale.—An order or decree confirming a judicial sale is a final and conclusive judgment, determining the rights of and possessing the same force and effect as any other adjudication by a court of competent jurisdiction. The confirmation binds the purchaser: See the monographic note to *Watson v. Tromble*, 29 Am. St. Rep. 495-499. Consult, also, *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 869, 57 Pac. 110; *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572, 26 S. W. 692.

COMMONWEALTH v. HARMON.

[199 Pa. St. 521, 49 Atl. 217.]

MURDER.—EVIDENCE OF THE DEFENDANT'S GOOD CHARACTER, on a trial for murder, is substantive and positive proof in his behalf, and may give rise to a reasonable doubt, which would not otherwise exist, by making it improbable that a man of such character would commit the offense charged; but if the jury is satisfied, beyond a reasonable doubt, under all the evidence, that the defendant is guilty, evidence of previous good character is not sufficient to overcome the conclusion which follows from that view of the case. (p. 801.)

Indictment for murder. The defendant was convicted of manslaughter, and appealed.

A. L. Cole, George A. Jenks, and S. V. Wilson, for the appellant.

W. I. Swoope, district attorney, A. H. Woodward, ex-district attorney, W. C. Arnold, and David L. Krebs, for the appellee.

523 MITCHELL, J. The single assignment of error is to the charge of the court on the subject of good character.

In his general charge, the judge said: "In regard to evidence of this character, it is the duty of the court to say to you, that where it is shown to your satisfaction that the defendant was of good general reputation for peace and good order in the community, that kind of testimony, if properly made out to you, is positive and substantive evidence, and it should be weighed by you in consideration of this case. The courts of highest resort in this state have said it is evidence which may work a doubt for the acquittal of the defendant. If that evidence is properly made out to you, it should be sufficient in that line. It is not, however, to weigh against positive facts which should convince your mind that this defendant did the deed which he is charged with committing here. Where the facts and circumstances are such as to leave no room for doubt, and the minds of the jury are thoroughly and fully convinced, this evidence itself would not then work the acquittal of the defendant, but it is to come in the consideration of the case the same as any other evidence as positive and substantive evidence, and to be weighed by you in that line." This was followed by the affirmance of the appellant's point in these words: "Evidence of good character is not a mere makeweight thrown in to assist in the production of a result that would happen at all events, but is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal." To this the judge answered: "That **524** proposition is correct. We have so indicated to you in what we have said before, and the proposition is affirmed." It is plain that the judge did not see any inconsistency in these two instructions, nor do we think they are fairly open to that objection.

The true rule was accurately expressed in *Commonwealth v. Eckerd*, 174 Pa. St. 137, 34 Atl. 305, in this form, that evidence of good character is substantive and positive proof in the prisoner's behalf, and may give rise to a reasonable doubt, which

would not otherwise exist, by making it improbable that a man of such character would commit the offense charged; but where the jury is satisfied beyond a reasonable doubt, under all the evidence, that the defendant is guilty, evidence of previous good character is not to overcome the conclusion which follows from that view of the case.

The charge complained of in the present case did not vary substantially from this rule.

Judgment affirmed.

Witness.—Evidence of the good character of witnesses is considered in the monographic note to *Lodge v. State*, 82 Am. St. Rep. 26-65.

Criminal Law.—The doctrine of reasonable doubt is discussed in the extended note to *Burt v. State*, 48 Am. St. Rep. 568-579.

COMMONWEALTH v. MOIR.

[199 Pa. St. 534, 49 Atl. 351.]

CONSTITUTIONAL LAW.—MUNICIPAL CORPORATIONS have no vested rights in their offices, their charters, their corporate powers, or even in their corporate existence. (p. 804.)

CONSTITUTIONAL LAW—LEGISLATION—MOTIVE OF. In enacting legislation as to municipal corporations the fact that the action of the state toward its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens is not one which can be made the basis of action by the judiciary, nor can the motives of the legislators, real or supposed, be considered. (p. 805.)

CONSTITUTIONAL LAW—IMPERFECTION OF ACT AS TO MUNICIPAL CORPORATIONS.—The fact that an act in relation to cities of the second class is imperfect and operates with great inconvenience, because of serious difficulties presented in regard to the passage of ordinances, does make it unconstitutional. (p. 806.)

CONSTITUTIONAL LAW.—THE CLASSIFICATION OF CITIES is a legislative, not a judicial, question. It is based on a difference of municipal affairs, and so long as it relates to, and deals with, such affairs, the questions of where the lines shall be drawn as to cities varying in population, and what differences of system shall be prescribed for differences of situation, are wholly legislative. (p. 807.)

CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENTS—SCHEDULE.—The substitution of a new form of city government is always accompanied by some shifting of officers and duties, and some inconvenience, and to reduce this to a minimum, by temporary adjustment of the changes, is the province of a schedule. Hence, in legislation which

involves such a change, a schedule of temporary expedients is usually and properly added, and the expedients provided would need to be very clearly unconstitutional, to justify a court in overturning them. (p. 808.)

CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENT AS TO OFFICE OF RECORDER.—An act in relation to cities of the second class is not unconstitutional by reason of the temporary expedients contained in the schedule thereto, that a recorder shall be appointed in each of the "existing" cities of the second class, and that he shall hold office for a time which passes over an election. (p. 808.)

CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENT AS TO CLASS—LOCAL ACT.—A temporary provision in the schedule of an act relating to cities of the second class, which applies to all the present members of the class, meets all the requirements of the temporary situation and ends with the end of that situation. It does not, therefore, make the whole act local or special. (p. 808.)

CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENT—ELECTION OF RECORDER.—There is no constitutional right of election in reference to the office of the chief executive of a city of the second class, called a recorder. The legislature, in changing the city government, may make such office permanently appointive, and what it can do permanently it may do temporarily. (p. 809.)

CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENTS.—MUCH LEGISLATIVE LATITUDE must be allowed to temporary measures incident to the adjustment of changes in a municipal system of government. (p. 810.)

CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENTS—TIME OF ACTS GOING INTO EFFECT.—It is desirable, but not essential, that an act making important changes in a city government should provide definitely when it shall go into effect. Hence, an act in relation to cities of the second class, which abolishes the office of mayor and substitutes that of recorder, is not unconstitutional because it vests in the governor the discretion of determining when it shall become operative by the appointment of a recorder. (p. 810.)

CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—ABOLITION OF MAYOR'S OFFICE.—There is no right to a public office unless it is under the express protection of the constitution, and such protection is nowhere given to municipal officers. Hence, the legislature, in substituting a new form of city government for an old one, has power to abolish the elective office of mayor and to substitute therefor the office of recorder. (p. 811.)

CONSTITUTIONAL LAW—ABOLITION OF MUNICIPAL OFFICES.—As a municipal office may be abolished by the legislature by a change of the charter, the question how great or how small the changes by the new charter shall be, and to what particulars they shall apply, is one wholly for legislative consideration. (p. 811.)

CONSTITUTIONAL LAW—STATUTE VOID IN PART.—A subordinate and severable feature of an act, though void, does not invalidate the remainder of it. (p. 812.)

CONSTITUTIONAL LAW.—APPOINTMENTS TO MUNICIPAL OFFICES need not be confirmed by the senate. (p. 812.)

CONSTITUTIONAL LAW—STATUTES—EXPRESSION OF SUBJECT IN TITLE.—The repeal of previous acts on the same general subject is always germane to the title of an act. (p. 813.)

CONSTITUTIONAL LAW—STATUTES VOID IN PART.—INVALID ARTICLES OF A STATUTE relating to cities does not nullify the remainder, where it is an independent and easily severable provision. (p. 814.)

CONSTITUTIONAL LAW—MUNICIPAL AFFAIRS—UNIFORMITY.—The constitution of Pennsylvania does not require uniformity of legislation with respect to municipal matters, but it does require that laws on certain subjects shall not be local or special, and this means that they must be general. The "uniformity" discussed in the decisions of that state is not a necessary requirement, but only a test of the generality commanded by the constitution. (p. 814.)

CONSTITUTIONAL LAW—CLASSIFICATION OF CITIES—LOCAL OR SPECIAL LEGISLATION.—The principle of classification of cities is not a departure from correct constitutional construction, and an act in relation to cities of the second class is not an abuse of the power of classification, although it was intended to apply only to three existing cities, nor is it unconstitutional on the ground of being local or special legislation. (pp. 814, 815.)

CONSTITUTIONAL LAW—MUNICIPALITIES—LEGISLATIVE CONTROL OF.—The control of the general subject of municipal administration is a necessary governmental power, which has been left by the Pennsylvania constitution of 1874, where it has always been, in the legislature, although that constitution contains a binding code of particulars and details, which stand in the path of much just, desirable, and necessary legislation. (p. 815.)

CONSTITUTIONAL LAW — STATUTES — VIOLATING SPIRIT OF CONSTITUTION.—Courts are not at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words. If the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, the courts cannot declare a limitation under the notion of having discovered something in the spirit of the constitution which is not even mentioned in the instrument. (p. 816.)

CONSTITUTIONAL LAW—LOCAL SELF-GOVERNMENT.—Although the constitution of Pennsylvania displays a strong intent, by many expressed prohibitions, to limit the power of the legislature with reference to interference in local affairs, yet the act of March 7, 1901, entitled "An act for the government of cities of the second class," does not violate the provisions of that instrument which preserve local self-government to the people. (p. 818.)

Quo warranto to determine the respondent's right to the office of recorder of the city of Scranton. The commonwealth demurred to the respondent's answer. There was a judgment on the demurrer in favor of the respondent, and the commonwealth appealed.

I. H. Burns, Joseph O'Brien, M. J. Martin, and Frederic W. Fleitz, for the appellant.

John G. Johnson, Knox & Reed, Clarence Burleigh, Lyon & McKee, Lewis McMullin, George M. Hosack, of Murphy & Hosack, and William W. Smith, for the intervenor, William J. Diehl, mayor of Allegheny City.

Richard C. Dale, James H. Torrey, A. A. Vosburg, and H. A. Knapp, for the appellee.

⁵⁴¹ MITCHELL, J. Municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers determined by the legislature, and subject to change, repeal, or total abolition at its will. They have no vested rights in their offices, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania. In *Philadelphia v. Fox*, 64 Pa. St. 169, 180, 181, this court, speaking through Sharswood, J., said: "The city of Philadelphia is a municipal corporation—that is, a public corporation created by the government for political purposes, and having subordinate and local powers of legislation. . . . It is merely an agency instituted by the sovereign for the purpose of carrying ⁵⁴² out in detail the objects of government, essentially a revocable agency, having no vested right to any of its powers or franchises, the charter or act of erection [creation?] being in no sense a contract with the state, and, therefore, fully subject to the control of the legislature who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangements or destroy its very existence with the mere breath of arbitrary discretion. . . . The sovereign may continue its corporate existence, and yet assume or resume the appointments of all its officers and agents into its own hands; for the power which can create and destroy can modify and change."

The fact that the action of the state toward its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens, is not one which can be made the basis of action by the judiciary. "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be

considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise and oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. . . . If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the mind of the judges to violate fundamental principles of republican government, unless it should be found that these principles are placed beyond legislative encroachment by the constitution": Cooley's Constitutional Limitations, c. 7, sec. 4, 6th ed., 1890, p. 201.

"If the legislature should pass a law in plain, unequivocal, and explicit terms within the general scope of their constitutional powers, I know of no authority in this government to ⁵⁴³pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to principles of natural justice, for this would be vesting in the court a latitudinarian authority, which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or at least not in harmony with the structure of our ideas of natural government": Rogers, J., in Commonwealth v. McCloskey, 2 Rawle, 374.

"It is no part of our business to discuss the wisdom of this legislation. However vicious in principle we might regard it, our plain duty is to enforce it, provided it is not in conflict with the fundamental law": Scowden's Appeal, 96 Pa. St. 422. This subject will be further discussed with reference to our own cases, in considering the argument that the statute violates the spirit of the constitution.

Nor are the motives of the legislators, real or supposed, in passing the act, open to judicial inquiry or consideration. The legislature is the law-making department of the government, and its acts in that capacity are entitled to respect and obedience until clearly shown to be in violation of the only superior

power—the constitution. “It is urged that the act before us was not passed for this purpose [as a police regulation], but as its title expresses, ‘to provide for cases where farmers may be harmed by such railroad companies,’ and it is contended that this shows conclusively that it was the design of the legislature to impose this new burden upon the railroad company for the benefit of the landholders, and not for the security of the traveling public. . . . We cannot try the constitutionality of a legislative act by the motives and designs of the lawmakers, however plainly expressed. If the act itself is within the scope of their authority it must stand, and we are bound to make it stand if it will upon any intendment. It is its effect, not its purpose, which must determine its validity. Nothing but a clear violation of the constitution, a clear usurpation of power prohibited, will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void”: Sharswood, J., in *Pennsylvania R. R. Co. v. Riblet*, 66 Pa. St. 164, 5 Am. Rep. 360; cited with approval by the present chief justice in *Commonwealth v. Kearny*, 198 Pa. St. 500, 48 Atl. 472.

“The means of the act of March 22, 1877, in relation to ⁵⁴⁴ cities of the second class . . . are not a subject for our opinion. The only question before us in these cases is upon the power of the legislature to pass this law”: *Kilgore v. Magee*, 85 Pa. St. 401.

It ought not to be necessary to restate principles so fundamental, nor to cite authorities so familiar and so long established. But the range of the argument, and the energy with which it was pressed, have seemed to make it proper to set forth clearly the only question before the court—the constitutionality of the statute in question. Much of the argument and nearly all of the specific objections advanced are to the wisdom and propriety and the justice of the act, and the motives supposed to have inspired its passage. With these we have nothing to do; they are beyond our province, and are considerations to be addressed solely to the legislature. This court is not authorized to sit as a council of revision to set aside or refuse assent to ill-considered, unwise, or dangerous legislation. Our only duty and our only power is to scrutinize the act with reference to its constitutionality, to discover what, if any, provision of the constitution it violates. We proceed, therefore, to the consideration of the specific objections made.

1. It is said that the act is void, because it is impossible of execution, and some very serious difficulties are pointed out in regard to the passage of ordinances, etc., by the lack of a complete system in the act itself, the failure to repeal the requirements in that respect of the general act of May 23, 1874, and yet the inconsistency of those requirements with such partial action as can be regularly taken under the provisions of this act. The imperfection of the act in this respect is manifest, but that does not make it unconstitutional. The effect may be to leave the affairs of the cities in a state of very regrettable confusion, but it has not been shown that the municipal government cannot be administered notwithstanding. Every city in passing from one class to another, and a fortiori in passing from one charter to another in the same class, retains and carries with it all its ordinances, and makes no change in its government except such as the law renders necessary to adjust it to the class into which it goes: *Commonwealth v. Wyman*, 137 Pa. St. 508, 21 Atl. 389. It may require consideration by the courts to determine how much of the general system of municipal government under the ⁵⁴⁵ act of 1874 is compatible with the provisions of the present act, and how far the new system is self-sustaining, and not improbably legislative assistance will be required for a smooth and harmonious working under one or both. But these matters must be determined as they arise. For the present nothing has been shown against the practical operation of the act beyond great inconvenience.

2. It is objected that the act attempts a classification in the method of filling municipal offices and of exercising municipal powers resting on no proper discrimination or foundation, in that it provides for methods of government and administration of cities of the second class different from those required in cities of the first and third class, in particulars where there is no real difference. It is sufficient to say of this that it is a legislative, not a judicial, question. The very object of classification is to provide different systems of government for cities differently situated in regard to their municipal needs. It was recognized that cities varying greatly in population will probably vary so greatly in the amount, importance, and complexity of their municipal business, as to require different officers and different systems of administration. Classification, therefore, is based on difference of municipal affairs, and so long as it relates to and deals with such affairs, the questions of where the lines shall be drawn and what differences of system shall be

prescribed for differences of situation, are wholly legislative. What is a distinction without a difference is largely matter of opinion. No argument, for example, could be more plausible than that there is no real difference in municipal needs between a city of ninety-nine thousand and one of one hundred thousand population. It is a sufficient answer that the line must be drawn somewhere, and the legislature must determine where. So long as it is drawn with reference to municipal and not to irrelevant or wholly local matters, the courts have no authority to interfere.

Stress was laid, in the argument of this objection, on the provision making the chief executive in cities of the second class, called a recorder, appointive, while in cities of the first and third classes he is elected and called a mayor. It would not follow that the legislature had exceeded its powers, if this feature had been made one of the permanent provisions of the act, but we are not called upon to consider that question now, ⁵⁴⁶ for the appointment directed is only part of the temporary adjustments provided in the schedule for the change.

The substitution of a new system for one under which government has been previously carried on is always accompanied with some shifting of offices and duties, and some inconvenience. To reduce this to a minimum by temporary adjustment of the changes is the province of a schedule. In well-considered legislation which involves such changes, a schedule of temporary expedients is usually and properly added, and the expedients provided would need to be very clearly unconstitutional to justify a court in overturning them. In *Lloyd v. Smith*, 176 Pa. St. 213, 35 Atl. 199, it is said: "In an exchange of offices there may naturally be some overlapping of terms and duties, and if in the legislative view the need for a controller was immediate, but the existing terms of the auditors prevented his present assumption of all the duties that would finally pertain to his office, it would not have been unwise, certainly not unconstitutional, to meet the case by a temporary expedient." The provision in the schedule of the present act, that the governor shall, within thirty days, appoint a recorder in each of the existing cities of the second class, is a temporary expedient, to put the machinery of the new system of government in immediate operation. We could not say that it is an unreasonable expedient for that purpose, even if the question of its reasonableness was not one for the legislature alone.

In this connection two other objections based on the same provision may be conveniently considered: 1. That the act is local, because the power of appointment of a recorder is confined to existing cities; and 2. That the recorder appointed is to hold office until 1903, thus passing over an election and depriving the citizens of an opportunity to elect their executive. These provisions are not part of the substantial and permanent features of the act, but of the temporary adjustment of the change. The reference to "existing" cities was in view of the existing but temporary situation. There are no other cities about to enter the second class, and if by any unforeseen possibility there should be another before 1903, it is by no means clear that the proper construction of the word "existing" should not refer to that date. However that may be, a temporary and transitory provision that applies to all the present members ⁵⁴⁷ of the class meets all the requirements of the temporary situation, and ends with the end of that situation, does not make the whole act local or special. In this connection the language of this court in *Pittsburg's Petition*, 138 Pa. St. 401, 427, 21 Atl. 757, 761, is very pertinent. It was urged that certain sections of the act then in question made the act local, "by fixing dates at which acts necessary to put the government in operation are to be done, which were possible only to one city, the city of Pittsburg, and which are impossible to the city of Allegheny which has come into the class since the act was passed. The reply to this objection is, that, at the date when the act became a law, there was but one city in the second class. The provisions of the act were general in their character. They related to all cities of the second class. If there had been several such cities, the terms employed would have applied to all alike. It was necessary, in order to give effect to the change in the system of municipal government, that a definite time should be fixed upon at which the change should take place and the new system be put in operation. The trouble with the act is not that it made such a provision for cities then entitled to a place in the second class, but that it did not also make similar provisions for cities that should thereafter be entitled to come into the class. We cannot hold, however, that the failure to provide a date for the organization of cities afterward to come into the class deprives such cities of the benefit of the law, or renders it local, and so inoperative, in the cities to which it would otherwise be applicable."

Of the objection that the citizens are deprived of an opportunity of electing the chief executive, it is sufficient to say that there is no constitutional right of election in reference to that office. The legislature might make it permanently appointive, and what they could do permanently they may do temporarily: *Philadelphia v. Fox*, 64 Pa. St. 169. It is conceded that if the act bore date of approval so near the day of election that the electors would have no proper opportunity to prepare for the election, the postponement would be free from objection. But what is a reasonable or proper opportunity is a question for the legislature. That the prolongation of a temporary appointment to a vacancy beyond an election not unduly close at hand, is unusual and contrary to what citizens are accustomed to regard⁵⁴⁸ as their moral and political rights, may be conceded, but that does not make it unconstitutional. Being an exercise of a legal and constitutional right by the legislature, they are answerable for their action only to their constituents.

The objections we have been considering, and in fact nearly all that have been raised in the case, are based on the provisions of the schedule, rather than on the permanent provisions of the act. Much legislative latitude must be allowed to temporary measures incident to the adjustment of changes of municipal system, and this consideration deprives the objections of some of the weight they might otherwise have.

It is further said that the act is unconstitutional, because it vests in the governor the discretion of determining when it shall become operative by the appointment of recorders. This again is an objection founded on the temporary expedients of the schedule, and would be sufficiently answered by the considerations already discussed under that head. That statutes making important changes in the law should provide definitely when they shall go into effect is desirable, but not essential. The legislature may make them operative from a future date, or within certain limitations make them retroactive. The present act in its first section abolishes the office of mayor and substitutes that of recorder. This, without more, would operate, as the rest of the act does, from the date of its approval. But to prevent a gap in the government and the resulting confusion of the city business, the schedule in section 2 continues the office of mayor temporarily until the new office of recorder is filled by the governor's appointment under section 1. There is nothing in this that is not entirely within the reasonable

province of a schedule for the initial operation of necessary changes.

A further objection made is that the act removes an elected officer, the mayor, from office during the term for which he was elected, by a mere change in the name of the office. The right to grant a new charter to the city, imposing a new form of government, is conceded, even though the effect is to abolish the office and to deprive the officer of his place. But it is argued that the merely nominal abolishing of the office by the substitution of one with the same powers and duties, only under a different name, is beyond the legislative power. It does not appear how this conclusion follows. There is no right to ⁵⁴⁹ a public office unless it is under the express protection of the constitution (Lloyd v. Smith, 176 Pa. St. 213, 35 Atl. 199), and such protection is nowhere given to municipal officers. On the contrary, the universal rule is that, unless otherwise directed by the new act, the officers go out with the charter under which they held, and the officers under the new charter take their places whether under the same or a different name. Merely official positions, unprotected by any special constitutional provisions, are subject to the exercise of the power of revision and repeal by the legislature: Kilgore v. Magee, 85 Pa. St. 401. "The argument is that the act is unconstitutional because it transfers the duties and emoluments of the office of district attorney to another. . . . The office of district attorney is not one of those which are usually denominated constitutional. . . . Not having been mentioned by the constitution, the legislature was left with unrestricted power to prescribe what the duties of the office should be, what the length of its tenure, what its emoluments, and how it should be filled. Having the power to create, they have also the power to regulate and even destroy. Undoubtedly, the legislature may at any moment repeal the act of 1850 and abolish the office. They may provide a substitute for it": Strong, J., in Commonwealth v. McCombs, 56 Pa. St. 436. "As this decision will deprive the respondent of a portion of the term of his office, some question arises as to the power of the legislature to enact a law having such an effect. But this is fully met by the decision of this court in the case of Commonwealth v. McComb, 56 Pa. St. 436. We there held as to offices which are legislative only and not constitutional, the power which created them may abolish or change them at pleasure without impinging upon any constitutional right of the possessor of the office, and without violat-

ing any duty of the legislative body": *Commonwealth v. Weir*, 165 Pa. St. 284, 30 Atl. 835.

It being conceded that the legislature may abolish municipal offices by a change of the charter, the question how great or how small the changes by the new charter shall be, and to what particulars they shall apply, is one wholly for legislative consideration. In the act under discussion the changes in the general scheme of government are many and important. With respect to the offices of mayor and recorder, each being the chief executive of a city, a similarity in their powers and duties ⁵⁵⁰ is natural if not essential, but the offices are not identical either in substance or in name. The recorder has far greater executive powers than his predecessor, the mayor, and yet lacks some of the other powers that the latter had. The very argument of the appellants first noticed, on the impossibility of execution of the act, was based on the recorder's want of the authority in the passage of ordinances which the mayor had, and which it was contended was essential to the operation of the new system.

A closely analogous objection is that the act gives the governor the power to remove an elected officer without cause. But this is not a correct reading of the act. Section 1 of the act itself removes the mayor by abolishing the office, but section 2 of the schedule continues the mayor in office *pro tempore* until his successor has been duly appointed under section 1. This is not a removal by the governor, whether that would be valid or not, but a legislative adjustment of the conditions of the change made necessary by the new charter. This has already been sufficiently discussed in considering the necessity and province of the schedule.

The objection that the act attempts to create an additional justice of the peace, permits his election at an improper time, and allows the governor to appoint to an office made elective by the constitution, need not be discussed at any length at this time. Clothing the chief executive of a city, *virtute officii*, with the powers and authority of a police magistrate, or even of a justice of the peace, technically so-called, is not necessarily void as providing for an additional justice of the peace, and if it should be so held on direct presentation of the question, it would not invalidate the present act of which it is a subordinate and severable feature. The provision for appointment by the governor is part of the schedule which has already been sufficiently discussed.

The objection that even if the appointment of a recorder were valid at all, the appointment of the respondent is void for want of confirmation by the senate, is based on section 8 of article 4 of the constitution, and it is sufficient to say that that section has no application to municipal officers: *Commonwealth v. Callen*, 101 Pa. St. 375.

It is further said that the act has more than one subject and ~~one~~ one not expressed in the title. This is based on the last section of the schedule, which is a repealing clause. It is enough to say at present that the repeal of previous acts on the same general subject is always germane to the title. Usually the repealing clause is only declaratory of what would be the legal effect without it, but it is useful as preventing doubt upon the legislative intent. And a clause saving from repeal an act that is not within the intent but might have appeared to come within the language of the repealing clause merely operates as a proviso, and is in no sense a re-enactment or extension of the act so executed. It makes no new law. If the section in question repeals expressly any act not germane to the general subject in the title, which has not yet been shown, the repeal might be ineffective but would not vitiate the whole act.

Again it is said that the act is unconstitutional because it provides by article 20 different laws for cities of the same class. The article reads: "From and after the passage of this act, all laws relating to cities of the third class shall continue to apply to cities of that class which have passed or may pass into a city of the second class by reason of increase in population, except so far as such laws are supplied by, or in conflict with, laws relating to cities of the second class." It would be sufficient to say that even if this article cannot stand, it will not affect the rest of the act. It is an independent and easily severable provision. But the article is at least partly declaratory, and it does not at present appear that it is anything more. Local and special laws are not repealed by subsequent general ones, unless such is the legislative intent, either expressed or unavoidably implied by the irreconcilability of the continued operation of both. How far this principle may be applicable to a city passing from one class to another is yet an open question. Thus, for example, when the city of Allegheny passed from the third to the second class it carried with it certainly all its local and special laws, enacted prior to 1874, which it had retained in the third class and which were not in irreconcilable conflict with the laws governing the second class. Whether it carried

also the powers and privileges which it had acquired as a city of the third class, subject, of course, to the same limitation that they are not in conflict with the system prescribed for the second class, has not yet been expressly considered. There is ⁵⁵² strong reason why that should be the rule. The sweeping away in one breath of a whole system, the growth of years and experience, and the substitution of an entirely new one, is fraught with great inconvenience, if not with more serious consequences. This court has said in *Commonwealth v. Wyman*, 137 Pa. St. 508, 21 Atl. 389, and *Commonwealth v. Macferron*, 152 Pa. St. 244, 25 Atl. 556, that the changes in the transition are to be confined to those absolutely necessary for adjustment to the new class. Some of the language used in *Commonwealth v. Macferron* would appear to indicate a presumption that each class is so distinct that in leaving it a city leaves everything that it acquired while in it. But the principle of minimizing the changes was again stated by our brother Fell, in *Shroder v. Lancaster*, 170 Pa. St. 136, 32 Atl. 586, without any such qualification. It is to be remembered that there is no constitutional requirement of uniformity. The mandate of the constitution is negative, that laws on certain subjects shall not be local or special. That means that they must be general, and the uniformity which is discussed in the decisions is not a necessary requirement, but only a test of the generality which is what the constitution commands. Article 20 of the present act settled the legislative intent in favor of the view that cities passing from the third to the second class shall carry with them all the laws not in conflict with the system provided for the second class. Whether such intent violates the required generality of the act may become the subject of consideration hereafter. But even if the article must fall on this account, it will not carry down the rest of the act, and that is all we need decide now.

It is further argued that this act is local and special, and therefore contrary to section 7 of article 3 of the constitution, because, although it relates in terms to cities of the second class, it is intended to apply only to the three existing cities of Pittsburgh, Allegheny, and Scranton. This objection is based mainly on the schedule, and has been sufficiently discussed already, except with reference to the intimation in the dissenting opinion, that it is an abuse of the power of classification, and perhaps that the principle of classification itself may be a departure from correct constitutional construction. It is far too late to

discuss this question. Classification was sanctioned deliberately and unanimously by our predecessors, more than a quarter of a century ⁵⁵³ ago and has never been shaken since. No judge now on this bench had any part in the original decision (*Wheeler v. Philadelphia*, 77 Pa. St. 338), and to start a question of its correctness would be a most flagrant and unjustifiable violation of the salutary maxim *stare decisis*. Nor is there any disposition to do so. On the contrary, every year's experience and every new question presented, have vindicated the wisdom and correctness of the principle there enunciated, and the steady tendency has been to broaden, instead of narrowing, its applicability. As has been said by this court, the constitution of 1874 was a new departure in the history of American law. Instead of being confined, as all previous constitutions had been, to the framework of the government, and to general principles for the protection of individuals and minorities against the oppression of irresponsible majorities, the people voluntarily tied their own hands, in the persons of their legislative agents, by a binding code of particulars and details that stand in the path of much just, desirable, and necessary legislation. The most emphatic expression of this limitation upon the powers of the legislature is found in article 3, section 7, under which most of the cases have arisen. The real evils, however, at which that article was directed, are pointed out in *Commonwealth v. Gilligan*, 195 Pa. St. 504, 46 Atl. 124, and *Clark's Estate*, 195 Pa. St. 520, 46 Atl. 127, and every decision in the last decade has shown the steady trend of the court, under the guidance of wider experience, not to extend that article to cases not really within the evil prohibited, though the form may have the appearance of coming within the words of the prohibition. As an illustration of the effect of a contrary view we may look at the case of the city of Philadelphia. The present charter, the act of 1885 commonly known as the Bullitt bill, was undoubtedly framed and passed in the most honest and patriotic effort for reform in municipal administration, whatever its success may have been in that direction. But its intent was just as distinctly local as that of the act of 1901 is alleged to be, and the construction that would strike down the latter would as inevitably strike down the former, and send Philadelphia back irremediably to its former discredited system. The sound result, after all views have been considered, is that the control of the general subject of municipal administration is a necessary gov-

ernmental power that has been left by the constitution where ⁵⁵⁴ it has always been, in the legislature, and that for any misuse of it the remedy must be applied by the constituencies in their dealing with their representatives.

The public interest of the questions involved, though not always their difficulty, has led us to discuss thus in detail the specific objections to the act that the learning and ingenuity of eminent counsel have been able to suggest. There remains one which is based upon broader and more far-reaching considerations than the others, though like most of them it is directed against the schedule. Indeed, the objections to this act may be summed up in the classic phrase "*in cauda venenum est.*" It is urged that it violates the spirit of the constitution in those provisions and that general intent which preserves to the people the right of local self-government.

The objection is serious, and there can be no denial that some of the provisions of the schedule infringe upon what the citizens generally are accustomed to regard as their political rights. But our view must be confined closely and exclusively to the constitution.

It may be admitted that even an act of the legislature can so far violate the spirit of the constitution as to be void, though not transgressing the letter of any specific provision. But such violation is exceptional, and must be made to appear beyond all doubt. Such, for example, is the illustration given by Chief Justice Thompson, in *Page v. Allen*, 58 Pa. St. 338, 346, 98 Am. Dec. 272: "To illustrate this idea, the executive power of the state under the constitution is lodged in a governor. It would be manifestly repugnant to these provisions of the constitution if an act of assembly should provide for the election of two executives at the same election, yet it would be unconstitutional only by implication, there being no express prohibition on the subject." *Prima facie*, the legislative authority is absolute except where expressly limited. This is the uniform principle of all political and legal views, and of all constructions recognized by constitutional law.

"To me it is as plain that the general assembly may exercise all powers which are properly legislative and which are not taken away by our own or by the federal constitution, as it is that the people have all the rights which are expressly reserved. We are urged, however, to go further than this, and ⁵⁵⁵ to hold that a law, though not prohibited, is void if it violates the spirit of our institutions or impairs any of those

rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every casus omissus, to interpolate into it whatever, in our opinion, ought to have been put there by its framers": Black, C. J., in *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147, 161, 59 Am. Dec. 759.

"However easy it may be to demonstrate that public debts (subscriptions to railroad and other enterprises) ought not to be created for the benefit of private corporations, and that such a system of making improvements is impolitic, dangerous, and contrary to the principles of a sound public morality, we can find nothing in the constitution on which we can rest our consciences in saying that it is forbidden by that instrument": Black, C. J., in *Moers v. Reading*, 21 Pa. St. 188, 200.

"To justify a court in pronouncing an act of the legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to be resolved in favor of the constitutionality of the act": Sharswood, C. J., in *Commonwealth v. Butler*, 99 Pa. St. 535.

"In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete authority as it rests in, and may be exercised by, the sovereign power of any state, subject only to such restrictions as they have seen fit to impose and to the limitations which are contained in the constitution of the United States. The legislative department is not made a special agency for the exercise of specially defined legislative powers, but is intrusted with the general authority to make laws at discretion": Sterrett, J., in *Powell v. Commonwealth*, 114 Pa. St. 265, 293, 60 Am. Rep. 350, 7 Atl. 913.

"Whatever the people have not, by their constitution, restrained themselves from doing, they, through their representatives in the legislature, may do. This latter body represents their will just as completely as a constitutional convention in all matters left open by the written constitution. Certain ⁵⁵⁶ grants of power, very specifically set forth, were made by the states to the United States, and these cannot be revoked or disregarded by state legislatures. Then come the specific restraints imposed by our own constitution upon our own legislature. These must be respected. But in that wide domain not in-

cluded in either of these boundaries, the right of the people, through the legislature, to enact such laws as they choose, is absolute. Of the use the people may make of this unrestrained power, it is not the business of the court to inquire": Dean, J., in *Commonwealth v. Reeder*, 171 Pa. St. 505, 513, 33 Atl. 67.

"Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the constitution which is not even mentioned in the instrument": Cooley's *Constitutional Limitations*, c. 7, sec. 6.

"It is also a maxim of republican government that local concerns shall be managed in the local districts, which shall choose their own administrative and police officers, and establish for themselves police regulations, but this maxim is subject to such exceptions as the legislative power of the state shall see fit to make, and when made, it must be presumed that the public interest, convenience and protection are subserved thereby. The state may interfere to establish new regulations against the will of the local constituency, and if it shall think proper in any case to assume to itself those powers of local police which should be executed by the people immediately concerned, we must suppose it has been done because the local administration has proved imperfect and inefficient, and a regard to the general well-being has demanded a change": Cooley's *Constitutional Limitations*, c. 7, sec. 5.

These citations might easily be multiplied, but I have not thought it necessary to lengthen this opinion by going outside of the text-books of recognized authority, and our own decisions. These establish beyond question the general rules of constitutional law, and show that nowhere have they been more uniformly and strongly enforced than in Pennsylvania. Some 557 of the cases arose before the adoption of the present constitution, but this does not affect the principles of the decisions, even though some of the actual questions might now be decided differently under the provisions of the present constitution, for when the constitution has once expressly spoken, all further debate is at an end. The present constitution, as has been said more than once by this court, displays a strong intent to limit the power of the legislature with reference to interfer-

ence in local affairs. As said by our brother Dean in *Perkins v. Philadelphia*, 156 Pa. St. 554 (565), 27 Atl. 356: "Assuming what was the settled law, that the general assembly had all legislative power not expressly withheld from it in the organic law, they [the convention] set about embodying in that law prohibitions which should in the future effectually prevent the evils the people complained of. Article 3 is almost wholly prohibitory; it enjoins very few duties, but the 'thou shalt not's' number more than sixty." This incontrovertible evidence that the constitution is the result of a full, detailed, exhaustive consideration of the subject of legislative control over merely local affairs, is of itself a conclusive argument against any further additions by the courts to its sixty and more expressed prohibitions. There is no sounder or better settled maxim in the law than "*Expressio unius exclusio est alterius*," and when the authorities which have the right to control any subject, be they only parties to a private contract, or the sovereign people in the adoption of their constitution, have fully considered and determined what shall be the rights, the powers, the duties or the limitations under the instrument, there is no longer any room for courts to introduce either new powers or new limitations. To do so would, in the language of Chief Justice Black already quoted, "be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, to interpolate into it whatever in our opinion ought to have been put there by its framers."

The most earnest consideration of the objections to the act of 1901 has convinced us that they are not such as authorize the courts to declare the act void for conflict with the constitution, but must be addressed only to the legislators and their constituencies.

Judgment affirmed.

Mr. Justice Dean Dissented, on the broad ground that the act in question was local and special legislation, in contravention of section 7, article 3, of the constitution, which provides that: "The general assembly shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, or school districts; . . . incorporating cities, towns, or villages, or changing their charters; . . . creating offices or prescribing the powers and duties of officers in counties, cities, boroughs, townships, election or school districts." "The act before us," he said, "affects but three cities in the commonwealth—Pittsburg, Allegheny, and Scranton. It does not touch Philadelphia city, nor any

one of the many other cities of the state; nor is there a single provision in it for any city which may hereafter reach the population of these three cities. It applies specially to these three—changes their charters, puts them under special provisions different from all other cities; to all intents and purposes, for a long period, governs them by a high executive officer of the commonwealth, resident at Harrisburg, many miles distant, necessarily ousting local officers elected by the people, whose terms have not yet expired. There is nothing peculiar in the geographical location of these cities, or in the character of their population or business interests, which calls for peculiar legislation such as this; nor is it intimated in the bill that any reason existed for depriving them of self-government and subjecting them to a foreign one, that would not apply to every other city in the state. It is given as the controlling reason in the majority opinion for declaring the act constitutional that nowhere does that instrument expressly forbid such legislation, and therefore, not being expressly forbidden, the legislature has all power not withheld. This proposition has been stated more than once in like language by courts when discussing constitutional questions; and while the facts in the cases before them did not render the language inapplicable, it was never intended to be of universal or even of common application.”

He then gave a judicial history of the section of the constitution above quoted, showing that it was adopted as a barrier against local legislation, which had demoralized the legislature and debauched the people; and commented upon the weakness of the court, in some cases, in permitting encroachments upon the judiciary department. He spoke of *Wheeler v. Philadelphia*, 77 Pa. St. 838, which allowed the classification of cities. The act of May 23, 1874, construed in that case, had divided the cities of the state into three classes for the purpose of corporate legislation, and authorized the legislature, by general laws applicable to each class, to legislate only for the cities of that class. “I always doubted the authority of this court,” said the learned justice, “to uphold this act; the reasoning in vindication of the judgment is not satisfactory or convincing; it is based upon the necessity for classification because of the inconvenience that would result if classification of cities was not held constitutional. It seems to me to be judicial legislation of the gravest character; it wrote into the constitution what was not there, and was not intended by the framers of it to be there.” He admitted such inconvenience, but thought that the proper remedy was by way of an amendment to the constitution.

“By our decision in the case before us,” he said, “we are going to step beyond anything heretofore allowed in the line of special legislation. It is purely a question of law whether section 7 of article 3 of the constitution has been violated, yet we, in effect, say it is the province of the legislature to decide the question and that we will not inquire into it. This, on our part, is a grave mis-

take. I would not encroach one inch on the authority of the legislature, but I would not allow that body, nor the executive, to encroach one inch on ours." He called attention to the fact that the act takes from one set of men the offices given them by the people, and hands them over to the governor, that he may confer them on others. "Here," he said, "we should call a halt upon such unconstitutional usurpation of power."

The dissenting justice declared that in *Ayar's Appeal*, 122 Pa. St. 266, 16 Atl. 356, the court was forced to say, respecting the scope of the decision in *Wheeler v. Philadelphia*, 77 Pa. St. 338: "It was never intended to license indiscriminate classification as a mere pretext for the enactment of laws essentially local or special." "We held," he continued, "in *Scowden's Appeal*, 96 Pa. St. 422, that classification not grounded on an imperious necessity was special legislation, and would be stricken down. Hence, when the legislature undertook to increase the classes to five, afterward to seven, we declared the acts unconstitutional, because such increase was without the slightest foundation in necessity. This court, after having decided that necessity warranted three classes, soon found itself forced to decide that it warranted no more. It was thus in the inconsistent position of acknowledging the authority of the legislature to determine the necessity of three classes, but denying its authority to say that more than three were necessary. This was plainly passing on the merits of the acts, when it was attempted to increase the classes. And I do not disclaim the power or wisdom of the court in so doing after it had acknowledged the authority of the legislature to classify at all, in the total absence of such authority in the constitution. It was bound to prevent the abuse of its own decision.

"What I object to here is, that the majority of the court disclaim the right to inquire into the purposes of this act, because it is sanctioned by the ostensible legality of general legislation for a class. More than thirty cases followed *Wheeler v. Philadelphia*, 77 Pa. St. 338, wherein the distinction between local and general legislation was involved. Not only was the question of the necessity for classification discussed, and the judgments determined by inquiry into the merits of the acts, but in *Scranton School District's Appeal*, 113 Pa. St. 176, 6 Atl. 158, in *Philadelphia v. Haddington M. E. Church*, 115 Pa. St. 291, 8 Atl. 241, and in *Weinman v. Wilkinsburg etc. Ry. Co.*, 118 Pa. St. 192, 12 Atl. 288, the merits of the pretended general legislation for a class were inquired into and the acts pronounced unconstitutional. In the first-named case we said: 'All our recent decisions are to the effect that if local results either are or may be produced by a piece of legislation, it offends against the article prohibiting local and special legislation.'

"It is now too late," he said, "after these decisions, to disclaim our judicial power to inquire whether the act before us is an adroit attempt to evade the constitutional prohibition against local and

special legislation. From its very terms it touches no subject which is not common to every other city in the commonwealth, and if there be a necessity for such legislation in these three cities, then there is the same necessity in all the others. This fact of itself stamps it as local and special legislation, for, as is said in *Ayar's Appeal*, 12 Pa. St. 266, 16 Atl. 356, there must be a necessity for the legislation 'springing from manifest peculiarities, clearly distinguishing those of one class from each of the others.' No peculiarities in cities of the second class demanding such a law are even pretended. Every member of this court concedes that this legislation is vicious. Why? They do not answer; but, to my mind, it is apparent that its vice consists in its flagrant violation of the fundamental law. We know its purpose was to oust one set of municipal officers in three certain cities, put in place, either directly or indirectly, by the people, and give their offices to others, through the chief executive of the state. This is the inevitable result from the bill itself. Can we assume that our lawmakers do not intend the obvious results of their acts?"

The learned justice did not consider the details of the bill, but dissented upon the broad ground that the act was local and special legislation, under the guise of a general law, and was, therefore, in direct violation of section 7, article 3, of the constitution. "The majority opinion," he said, "is, in the main, based on the authority of the legislature to pass a general law for a class and a disclaimer of our authority to inquire into the merits, to ascertain whether the law was intended to be, and is, in fact, a local and special law in its results. I concede there is no express prohibition in the constitution forbidding such legislation if it be in general terms a general law, but if it be only in terms general, nevertheless, in intent and results, special, then its unconstitutionality is a necessary implication, and we are not shut off in our inquiry by general terms. The argument to sustain the act because of no express prohibition in the constitution must fail in face of the plainly implied one." He then quoted from *Commonwealth v. Zephon*, 8 Watts & S. 382, 386, to show that "a constitution is not to receive a technical construction like a common-law instrument or statute," but that "it is to be interpreted so as to carry out the great principles of the government, not to defeat them"; and from *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272, to show that the inhibitions of the constitution need not always be express, but "are equally effective, and not less to be regarded, when they arise by implication," and that "this is the case when the legislative provision is repugnant to some provision of the constitution."

"I fear," concluded the learned justice, "the time is not far distant when the pernicious results of our decision will either bring about a constitutional enactment to remedy the mischief, or move us to overrule it." The above dissent was concurred in by McCollum, O. J., and Mestrezat, J.

A Statute Void in Part is not necessarily void in toto: *State v. Santee*, 111 Iowa, 1, 82 Am. St. Rep. 489, 82 N. W. 445.

Constitutional Law.—Courts do not deal with the mere justice, propriety, or policy of a statute: *Townsend v. State*, 147 Ind. 624, 62 Am. St. Rep. 477, 47 N. E. 19. Neither the wisdom of a law nor the hardships which it may impose upon municipalities without any fault or neglect of duty upon their part, are matters for discussion or decision in passing upon its constitutionality: *Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 69 Am. St. Rep. 821, 53 N. E. 68.

The Sufficiency of Titles to Statutes, within the constitutional requirements, is discussed in the monographic notes to *Crookston v. County Commissioners*, 79 Am. St. Rep. 456-486; *Bobel v. People*, 64 Am. St. Rep. 70-107.

Constitutional Law.—Classification on the basis of population in a statute relating to the machinery and powers of municipalities is legitimate, if such population bears a reasonable relation to the necessities of the municipalities. Classification in such cases is necessarily committed to the judgment of the legislature, and its judgment must prevail unless the classification is plainly illusory or applied illusively: *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 449. See, further, the monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789.

A Municipal Corporation has no Vested Right to any of its powers or franchises, but is subject to the control of the legislature: *Coyle v. McIntire*, 7 Houst. 44, 40 Am. St. Rep. 109, 30 Atl. 728. So far as the public franchises and existence of municipal corporations are concerned, the legislature may exercise over them exclusive control, and may constitutionally enlarge, restrain, and even destroy their municipal existence: *Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748; *Mayor v. Groshon*, 30 Md. 436, 96 Am. Dec. 591. The legislature, as a rule, has plenary power in respect to municipal corporations; and the courts uphold legislative acts relating thereto, unless their unconstitutionality is clearly apparent: *Mayor v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 947.

The Legislature may Remove Public Officers, not only by abolishing the office, but by declaring it vacant: *Attorney General v. Jochim*, 99 Mich. 358, 41 Am. St. Rep. 606, 58 N. W. 611.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

**YOUNGBLOOD v. SOUTH CAROLINA AND GEORGIA
RAILROAD COMPANY.**

[60 S. O. 2, 88 S. E. 232.]

APPELLATE PRACTICE.—OBJECTIONS TO EVIDENCE NOT RULED upon at the trial cannot be urged in the appellate court. (pp. 825, 826.)

DAMAGES.—Evidence of the number and ages of the members of plaintiff's family dependent upon him for support is admissible in an action to recover for personal injuries to him, to prove that such injuries deprive him of capacity to meet obligations imposed upon him by law. (p. 826.)

PLEADING—EFFECTS OF PERSONAL INJURY.—In an action to recover for personal injury from negligence, the plaintiff is entitled to show direct specific effects of the injury, without alleging them, as that it produced a particular disease or ailment. (p. 827.)

EVIDENCE.—IN AN ACTION TO RECOVER FOR PERSONAL INJURY suffered from insecure and defective coupling appliances, plaintiff is entitled to prove that the defendant failed to furnish him with a coupling stick, as was customary under the circumstances. (pp. 828, 829.)

MASTER AND SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.—If the evidence as to the assumption of risk by an employé is susceptible of more than one inference, the question of negligence and assumption of risk is properly submitted to the jury. (p. 830.)

MASTER AND SERVANT—ASSUMPTION OF RISK.—UNDER THE SOUTH CAROLINA CONSTITUTION, if an employé is injured while voluntarily operating machinery after knowledge of its unsafe condition, he may nevertheless recover. (p. 830.)

ONE RAILROAD COMPANY USING THE CARS OF ANOTHER must keep them in repair and free from defects. (p. 833.)

MASTER AND SERVANT.—SERVANTS ASSUME ALL RISKS IN THE USE OF MACHINERY, except those flowing from the master's negligence in his duty of furnishing safe machinery and keeping it in repair. (p. 833.)

JURY TRIAL.—INSTRUCTIONS UPON SPECIFIC PROPOSITIONS are waived unless specially requested. (p. 833.)

S. L. Abney and E. M. Thompson, for the appellant.

P. H. Nelson and Melton & Besler, for the appellee.

12 GARY, J. This is an action for damages sustained by the plaintiff, while in the employment of the defendant as switchman in its yard in the city of Columbia, on the third day of December, 1898. The complaint alleges that on said day the defendant, in disregard and violation of its duty, negligently and carelessly provided and furnished to the plaintiff a car which was not good, safe, or secure, in that the coupler and the coupling appliance thereof were worn, broken, and defective; that while the said car was in the use and service of the defendant, the plaintiff, while adjusting the coupler and coupling appliances thereof, in the endeavor to couple the same with those of another car of, and in the use and service of, the defendant, his right forearm, by reason and in consequence of the unsafeness, defectiveness, and insecurity aforesaid, was caught between the coupler of said cars and crushed, bruised, and broken; that by reason thereof the plaintiff suffered great bodily pain, and was ill and incapacitated for work for about three months, and was compelled to have his forearm amputated, and was permanently injured in the loss of said forearm.

The defendant answered the complaint denying its allegations, and setting up the defense of contributory negligence.

At the conclusion of plaintiff's testimony, the defendant made a motion for a nonsuit, which was refused. The jury rendered a verdict in favor of the plaintiff for two thousand seven hundred dollars.

The defendant appealed upon exceptions, the first and second of which are as follows: "1. Excepts because the presiding judge erred in allowing the plaintiff to testify, over the objection of defendant, as to being a married man, and as to the number of his children and their ages; because, it is submitted, such evidence was irrelevant to any issue raised by the pleadings, and was incompetent upon the question of the amount of damages claimed; 2. Excepts because the presiding judge erred in **13** overruling defendant's objection to and al-

lowing the plaintiff to answer the question, 'Has your wife and those children any means of support except what you provide for them?' Answer, 'No, sir.' Such evidence, it is submitted, being irrelevant to any issue raised by the pleadings and incompetent upon the question of the amount of damages claimed."

The questions presented by these exceptions arose during the examination in chief of the plaintiff, as follows:

"Q. Are you a married man? A. Yes, sir.

"Q. How many children have you?

"Mr. Abney.—We object.

"Q. (By Mr. Nelson.) What means have you for support besides which you can make by your labor? A. None at all.

"Q. Are you dependent upon that for a support for yourself and family? A. Yes, sir.

"Q. What family have you?

"Mr. Abney.—We object to the testimony with regard to the condition of the plaintiff, as to his financial condition, as to his family relations or anything else.

"The Court.—A man is bound by law to provide for the support of his family, so far as he can do so. Now, if this man's children were independent, self-supporting, if they were of age, I think the question might be irrelevant whether he had any children; but if those who are dependent upon him for support, and for whose support the law imposes on him the obligations of providing for them, then it becomes competent, under the allegation of the complaint, that he is permanently injured, in ascertaining the question of the extent of the injury, in so far as it may or may not incapacitate him to meet the obligations which are imposed upon him by law. I think the question competent.

"Q. How many children have you? A. Five.

"Q. How old is the oldest one? A. Ten.

"Q. And the youngest? A. About five months.

"Q. Has your wife and those children any means of support except what you provide for them?

"Mr. Abney.—We continue to object to the whole line of the evidence.

"The Court.—Note the objection, which is overruled.

"A. No, sir."

The grounds of objection are not stated. When objection is made to the introduction of testimony, ¹⁴ the ground thereof should be clearly and specifically stated, in order that the

circuit judge may know upon what question he is requested to rule. "A ground of objection which was not ruled upon by the presiding judge cannot be urged in this court": *Allen v. Cooley*, 53 S. C. 80, 30 S. E. 722; *Norris v. Clinkscales*, 59 S. C. 243, 37 S. E. 821. But waiving this objection, the testimony was admissible, not for the purpose of showing that the plaintiff was entitled to recover damages sustained by the members of his family, by reason of his injury, but as tending to show that one of the direct and proximate results flowing from the defendant's alleged negligence was to deprive him of the capacity to meet the obligation imposed upon him by law of supporting his family: *Johns v. Charlotte etc. R. R. Co.*, 39 S. C. 162, 39 Am. St. Rep. 709, 17 S. E. 698; *Mathis v. Southern Ry. Co.*, 53 S. C. 258, 31 S. E. 240. If this was a direct and proximate result of the injury, we see no reason why it should not have been considered by the jury in estimating the damages which he sustained: *Pickens v. South Carolina Ry. Co.*, 54 S. C. 498, 32 S. E. 567. A person is certainly damaged when he is deprived of the ability to meet a legal obligation. These exceptions are overruled.

The third exception is as follows: "3. Excepts because the presiding judge erred in overruling defendant's objection to and allowing the plaintiff to answer the question, 'And your general health, since you lost this arm, your general health, has it been good or impaired?' Answer, 'Been bad, I have suffered from rheumatism ever since.' Whereas, it is submitted, that the complaint containing no allegation that plaintiff's health had been affected, such evidence should have been excluded." In 5 *Encyclopedia of Pleading and Practice*, 746, 747, under the head of "Describing Injuries," it is said: "It is not necessary in such actions that the petition should undertake to give a specific catalogue of the plaintiff's injuries. It is enough that the declaration shows the injury complained of, without describing it in all its seriousness, and a recovery should be had in proportion to the extent of the injury." And under the head of "Effect ¹⁵ or Result of Injury," we find the following on page 747: "Nor do the rules of pleading require that every effect or result following the infliction of particular injuries shall be set forth in the declaration in order to recover therefor, since such a course would, in effect, require the pleading of the entire evidence." In 3 *Sutherland on Damages*, 2661, 2663, the rule is thus stated: "The general rule in tort is that the party who commits a trespass

or other wrongful act is liable for all the direct injury resulting, although such injury could not have been contemplated as the probable result of the act done. The plaintiff may show specific direct effects of the injury without specially alleging them; as that he was thereby made subject to fits. If they were a part of the result of the injury, the plaintiff may recover for such damage without specially alleging it, as well as the pain and disability which followed." This language is quoted with approval in *Croco v. Oregon Short Line Ry. Co.*, 18 Utah, 811, 54 Pac. 985, in which the rule just stated is sustained both by reasoning and authorities. This exception is overruled.

The fourth, fifth, sixth, and seventh exceptions were argued together, and are as follows: "4. Excepts because the presiding judge erred in overruling defendant's objection to and allowing the plaintiff to answer the question, 'One engaged in the service you were, as coupler, is it usual to furnish them with any implement, anything to work with, a car-coupler or stick?' Answer, 'Yes, sir, the Southern road requires you to use sticks.' Such evidence, it is submitted, was irrelevant to any issue raised by the pleadings, the evidence admitted was as to a charge of negligence not covered by the allegations of the complaint. 5. Excepts because the presiding judge erred in allowing plaintiff to testify, against the objection of defendant, that he had not been furnished with any coupling stick. For the same reason as in (4), supra. 6. Excepts because the presiding judge erred in overruling defendant's objection to and allowing the plaintiff to answer the question, 'After this accident happened and your arm crushed, ¹⁶ were you asked about your coupling stick or to receipt for one?' Answer. 'Yes, sir.' For the same reason stated in (4), supra. 7. Excepts because the presiding judge erred in allowing plaintiff to testify, over the objection of defendant, that the yardmaster who hired him, and under whose direction he was, tried to get him to receipt for a coupling stick. For the same reason as stated in (4), supra, and that the authority of such yardmaster had not been shown." These questions arose as follows, when the plaintiff was recalled, to wit:

"Q. One engaged in the service you were, as coupler, is it usual to furnish them with any implement, anything to work with, a car-coupler or stick? A. Yes, sir; the Southern road requires you to use sticks.

"Mr. Abney.—We object. Has no bearing on this issue at all. The charge is, he went in there to couple. No charge of negligence that we did not furnish him with implements.

"The Court.—I think it competent.

"Q. (By Mr. Nelson.) Were you furnished with any coupling stick? A. No, sir.

"Q. After this accident happened and your arm crushed, were you asked about any coupling stick or to receipt for any one? A. Yes, sir.

"Mr. Abney objected.

"The Court.—'Coupling appliances' would embrace set of appliances. It is for the jury to say what a set of coupling appliances consist of, or embrace. If any part of a safe or complete set of coupling appliances was missing, it would be a defective set of coupling appliances. I will allow the question competent.

"Q. (By Mr. Nelson.) State what request was made of you in reference to coupler afterward?

"Mr. Abney.—I add the further objection. Counsel has not shown that any such effort was made by any authorized agent of the company in the scope of his authority.

"Q. (By Mr. Nelson.) Was any effort made to secure from you a receipt for a coupler by any authorized officer of the company, after the accident?

"Mr. Abney.—We object. The authority must appear.

"Q. (By Mr. Nelson.) Did the yardmaster, who hired you and under whose direction you were, try to get you to receipt for one? ¹⁷ A. Yes, sir."

The questions raised by these exceptions are satisfactorily disposed of by the remarks of his honor, the circuit judge, when he overruled the defendant's objection to the introduction of said testimony. The exceptions are overruled.

The eighth exception is as follows: "8. Excepts because the presiding judge erred, as a matter of law, in overruling defendant's motion for nonsuit upon the ground that the only inference from the evidence for plaintiff was that plaintiff knew of the defect in the coupler, and after such knowledge assumed the risk of using the same. Whereas, plaintiff's evidence (capable of but one inference) having shown that the defect complained of was open and obvious, and not hidden, and that plaintiff knew of it, and after such knowledge undertook to use it, he should not recover for any injury resulting therefrom."

The record contains the following relative to the motion for nonsuit:

“Mr. Thompson.—The defendant submits a motion for non-suit upon the ground that the plaintiff voluntarily assumed the risk of going in between those cars, that the danger was obvious, that there was no latent defect whatsoever. The chain to the lever is the defect complained of. He testified that as he went down to the edge of this car, he saw this defect; he knew at that time that a coupling was to be made; that the engine was moving backward from Gervais street, with seven cars attached to the front of it; he saw this defect, and in the face of it went in to make this coupling. He is corroborated in that by his witness, Alexander Nelson, who says he saw this defect from the end of the car; he saw the chain was broken before he went between the cars, and there can be but one inference from the testimony adduced, that it was an obvious fact, and that he voluntarily assumed that risk, for he says positively himself that no one ordered him into that place of danger.” (Argued.)

“The Court.—It is true, a servant does assume the ordinary risks of his employment, and cannot hold his employer responsible for injuries arising from the ordinary risks, because he assumes ¹⁸ that; that is a principle of law. Now, the question whether he assumed extraordinary risk or not is a question for the jury.” (Motion overruled.)

In the case of *Bussey v. Charleston etc. Ry. Co.*, 52 S. C. 438, 30 S. E. 477, the court says: “It is the duty of the master to provide suitable machinery and appliances, and to keep them in proper repair. The employé has the right to assume that the master has discharged his duty in this respect, and is not bound to exercise care in ascertaining whether the master has so acted. When, however, the employé has knowledge, or receives warning, that the master has not furnished suitable machinery, or that it has not been kept in proper repair, so that it becomes dangerous, and he continues to use the same after such knowledge or warning, then it is a question to be determined by the jury whether, under the circumstances, the employé failed to exercise ordinary care and prudence, and was thereby guilty of negligence.” Mr. Justice Jones, in delivering the opinion of the court in *Mew v. Charleston etc. Ry. Co.*, 55 S. C. 90, 32 S. E. 828, uses this language: “Whether the matter of assumption of risk by an employé is to be tested by the law of waiver (*Hooper v. Columbia etc. R. R. Co.*, 21 S. C. 541, 53 Am. Rep. 691), or the law of negligence (*Bussey v. Charleston etc. Ry. Co.*, 52 S. C. 438,

30 S. E. 477), in either case it is a question of fact for the jury." We are satisfied that the testimony was susceptible of more than one inference, and, therefore, the case was properly submitted to the jury.

But section 15, article 9, of the constitution sets at rest any doubts that might be entertained on this question. It provides that "knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to the conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." In other words, where an employé is injured while voluntarily operating machinery after knowledge of its unsafe condition, his action for injury caused thereby shall not be defeated by reason of this fact. The word "defense" is not used in its ¹⁹ technical sense. The words, "shall be no defense to an action," are to be understood as meaning "shall not defeat an action." The constitution did not intend to deal with pleadings, but with a principle of law. It did not intend that a defendant on a motion for nonsuit should get the benefit of a state of facts which the constitution declared should be no defense to the action. The object of this provision was to take from a defendant that failed to furnish suitable machinery the right to defeat an action by the employé, by showing that he did not act with due care in voluntarily operating the machinery after knowledge of its defective condition. The only ground of the motion for a nonsuit was the fact that the plaintiff operated voluntarily the defective appliances after knowledge of their unsafe character, which we have shown could not defeat the plaintiff's action. This exception is overruled.

The ninth exception is as follows: "9. Excepts because the presiding judge erred in refusing to allow the witness, D. S. Gilliard, to answer the question propounded to him by defendant's attorney, 'Is that your notation?' Such question being competent and relevant to show the care used by defendant in the inspection of one of the cars between which (as defendant by its evidence undertook to prove) the plaintiff was injured, and bearing directly upon the question whether the coupler thereof was defective, the report to which the question referred being the original report of the conductor of the train which brought said car into Columbia, and whose duty it was to note all defects in said report." It is suffi-

cient answer to this question to state that this testimony was afterward admitted. This exception is overruled.

The tenth exception was abandoned.

The eleventh exception is as follows: "11. Excepts because the presiding judge erred in refusing to charge the defendant's second request to charge, which was as follows: 'If the jury find from the evidence—if there be such evidence—that the cars between which plaintiff is alleged to ²⁰ have been injured were foreign cars—i. e., cars of another company than the defendant company—then it is only required of the defendant to make an ordinary and reasonable inspection of such cars for any defects which may be discernible by an ordinary examination.' It is submitted that said request should have been charged unqualifiedly, as it contained a correct statement of the law applicable to the case, and properly drew the distinction between the duty of the defendant with reference to foreign cars and cars of its own, showing that as to foreign cars the duty of the railroad company was not that of furnishing proper machinery for service and keeping the same in repair, but it is one of inspection only, and was performed when the defendant had made a reasonable inspection of such foreign cars for any defects which might be discernible by an ordinary examination. The charge of the presiding judge with reference to said request was erroneous, in that it ignored the distinction sought to be made, and drew a comparison only as to the inspection of the respective cars, leaving the general propositions of law as to master and servant as stated in his charge to apply alike to foreign cars as well as cars of its own." In the first place, there was no testimony from which the jury had the right to infer that they were foreign cars; and in the second place, the proposition embodied in the request was not sound. The language of Mr. Chief Justice Simpson, who delivered the opinion of the court in *Wallingford v. Columbia etc. R. R. Co.*, 26 S. C. 258, 2 S. E. 19, is applicable to this case. He says: "The responsibility of a common carrier is to transport, safely and securely, which includes, as to railroad common carriers, the necessity of having safe appliances, cars, machinery, etc., and we know of no principle of law which would allow them, when damage is done by a defective car, to shield themselves upon the ground that said car belonged to, and was used by, another company. When the car here was received by the defendant, it was adopted as a part of defendant's train, and defendant then became as fully responsible

for its character, etc., as if it was their own car.”²¹ It is true, that was not a case involving the relation of master and servant. The law, however requires a master to furnish suitable appliances for his employes, and we see no reason why he should shield himself behind the fact that they were the property of some one else. This exception is overruled.

The twelfth exception is as follows: “12. Excepts because the presiding judge erred in refusing to charge the defendant’s third request to charge, which was as follows: ‘3. It was the duty of the plaintiff, Youngblood, to know whether there was anything in the construction of the couplers in question requiring more care than was required in an ordinary case of coupling, if he had a reasonable opportunity to discover the fact, provided these things were open and obvious and not hidden. If he had such knowledge, or ought to have had it, as just stated, then you will consider the existence of such knowledge in ascertaining whether he exercised the care which an ordinarily prudent man would exercise under the circumstances. If he did not, he cannot recover.’ It is submitted that said request contained a correct principle of law applicable to the case. It undertook to state the law, that it was proper for the jury to consider the fact (if it had been proven) that plaintiff was aware of the defect in the coupler, with a view to determining whether or not he exercised due care under the peculiar circumstances that surrounded him. Whereas, the presiding judge refused the same because it did not go far enough in stating the doctrine of contributory negligence (as to which he had already charged the jury), nor the consequences of contributory negligence.” In refusing the request, the presiding judge said: “That proposition is also faulty, in that it does not go far enough in stating the doctrine of contributory negligence nor the consequences of contributory negligence. Contributory negligence in the plaintiff, Youngblood, could not be a defense to the action, unless it is the cause either entirely or as one of the proximate causes of the injury; and so, however negligent he²² may have been either in failing to inform himself or in acting upon the knowledge which he had, or in failing to act upon it, unless such negligence did contribute to the injury, it is not a defense against the plaintiff’s action; and so the court is bound to refuse to charge you that proposition.” Not only was this a good ground for refusing the request to charge, but it was in conflict with the doctrine announced in the case of *Bussey v. Charleston*

etc. Ry. Co., 52 S. C. 438, 30 S. E. 477. Furthermore, the only fact upon which the defendant relied to show that the plaintiff did not act with due care was that he voluntarily operated the appliances, after knowledge of their unsafe condition and, as we have stated, this could not defeat his action. This exception is overruled.

The thirteenth exception is as follows: "13. Excepts because the presiding judge erred in charging from plaintiff's second request the following: 'A servant assumes all risks except those which flow from the master's negligence in his duty in furnishing safe machinery and in keeping the same in repair.' For it is submitted that such charge is erroneous, in that it recognized no difference between latent and patent defects in the machinery; it was further erroneous in that it should have been modified by adding that if there was a defect in the machinery or appliance which was open and obvious, and of which the servant had knowledge, that the servant assumes the risk from such defective machinery or appliance; it was further erroneous in that it was not made applicable to 'foreign cars' and the duty of the master with reference thereto, such duty being only that the same shall receive a reasonable inspection." The charge stated correctly the general proposition of law. If the defendant desired a charge upon a specific proposition, he should have presented requests to that effect. The other grounds of alleged error are disposed of by what was said in considering the other exceptions. This exception is overruled.

The fourteenth exception is as follows: "14. Excepts because the presiding judge erred in charging plaintiff's fifth²³ request to charge, which was as follows: 'Knowledge by any employé injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, such as injury resulting from a defective switch, coupler, or other appliance in use by railroad companies.' It is submitted that such charge was erroneous, in that it excluded the defenses under such constitutional provision: 1. That the servant might assume the risk by remaining in the service of the master after knowledge (if proven) of defective machinery or appliances within the obligation of the master to provide against, and thus waive the obligation of the master; 2. That if the employé has knowledge that the machinery is defective, so that it becomes dangerous, and he continues to use the same after such knowledge,

the jury may say whether such employé failed to exercise ordinary care and prudence, and was thereby guilty of negligence precluding a recovery." The charge is in the language of the constitution, which has already been construed, except the last sentence, which was merely illustrative and applicable to the case. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

EVIDENCE OF DOMESTIC RELATIONS OF PERSON SEEKING TO RECOVER FOR PERSONAL INJURIES.

I. In Actions Where Death has not Resulted.

- a. General Rule Respecting Evidence of Plaintiff's Family.
- b. Number and Ages of Plaintiff's Children.
- c. Evidence that Plaintiff has Wife and Child or Children.
- d. In Actions for Injuries to Plaintiff's Child.
- e. Error in Admitting Evidence, Correcting by Instruction to the Jury.

II. In Actions Where Injuries have Resulted in Death.

- a. Suits by Widows to Recover for Death of Husbands.
- b. Suits by or for the Benefit of Other Dependents to Recover for Death of their Supporters.

I. In Actions Where Death has not Resulted.

a. General Rule Respecting Evidence of Plaintiff's Family.—

In an action to recover damages for a personal injury it is generally maintained that the measure of damages goes only to the actual damages sustained by the plaintiff himself, and hence that the fact that he is a married man, or a man of family, or as to the number or pecuniary condition of his family, does not have any legitimate bearing upon the question of such damages, and that evidence of such fact is irrelevant and immaterial, and not admissible for the purpose of enhancing the damages: *Pennsylvania etc. R. R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Chicago v. O'Brennan*, 65 Ill. 160; *Pittsburg etc. Ry. Co. v. Powers*, 74 Ill. 341; *Hewitt v. Flint etc. R. R. Co.*, 67 Mich. 61-81, 34 N. W. 659.

In *Warren v. Wright*, 5 Ill. App. 429, it was held that evidence that plaintiff is a poor man, and of the destitution of his family, is irrelevant and inadmissible in an action to recover for injuries arising from the negligence of a municipal corporation.

In *Kansas etc. Ry. Co. v. Pointer*, 9 Kan. 621-627, the court said: "Of course, it was incompetent, for the purpose of showing the injuries, or their character or extent, or for the purpose of enhancing the damages which the plaintiff expected to recover, for the plaintiff to prove his pecuniary or social position, whether he was rich or poor, married or single, or whether he had a family

or not. Neither of these could throw any light upon the character or extent of the injuries, nor could either in any way tend to show how much the plaintiff was damaged. Neither could in any way enhance or diminish the amount for which the plaintiff should recover."

In *Gallon v. Lauer*, 55 Ohio St. 392-395, 45 N. E. 1044, the action was to recover against a city for an injury sustained because of a defective sidewalk. Evidence was admitted, over objection, that plaintiff had a family, and the supreme court said that "this evidence was not pertinent to the issues in the case and joined between the parties. The plaintiff's right of action did not depend upon the question of his marriage, nor upon that of his fatherhood, and the defendant was bound to no higher duty toward a married man or a father than to one who has neither of these characters. If the right of action existed, the damages lawfully recoverable should be no more affected by these circumstances than the right of action itself."

And in *Pittsburg etc. Ry. Co. v. Powers*, 74 Ill. 341, it was held that in a suit by a servant of a railway company to recover for personal injury while in the company's employ, it is error to admit evidence that the plaintiff had a family, and was unable to support them since the injury; that to admit such evidence is virtually to impose upon the company the duty of supporting plaintiff's family, which is not required when a servant is injured while in the employ of the railroad company even by its negligence.

In an action against a city to recover for personal injury received through its negligence, the plaintiff testified, over objection, that he had a family dependent upon him at the time of the accident, and that he was their supporter as a lecturer. This admission of testimony was held error by the supreme court, and it said: "Was this evidence admissible? If it was, then it would have been competent to have gone further, and shown all the circumstances of the family. Such as that the mother was an invalid, that one of the daughters was blind, that one son had accidentally lost a leg, etc., if such had been the case, so as to present a most pitiable picture of a helpless family dependent upon appellee for support as a lecturer. For, as the evidence had no place in the case except as a stimulant to the sympathy of the jury, it would be just as competent to make the stimulant strong as weak. But it was not competent at all. It is an elementary rule that the evidence must be confined to the points in issue. There was no point in issue to which this evidence had any relevancy. Could it have any legitimate bearing upon the question of damages? By no means. Because in a case like this, the measure of damages goes only to the actual damage sustained, and compensation is the rule": *Chicago v. O'Brennan*, 65 Ill. 100, 163.

In a suit to recover damages for personal injury, what plaintiff's time was worth to his family during the period when he was rendered unable to work is not admissible in evidence as an element of damage: *Austin v. Ritz*, 72 Tex. 801, 9 S. W. 884.

Testimony having been received in a personal damage case to show what was plaintiff's employment before his injury, and that he supported himself and his wife solely from his earnings therein, the supreme court of New York sustained this action in *Alberti v. New York etc. R. R. Co.*, 43 Hun, 421. But this ruling was disaffirmed by the court of appeals, which said: "The plaintiff and his wife gave testimony to the effect that he was dependent upon his earnings for the support of himself and his wife. This was given under the objection and exception of the defendant. As bearing upon the question of damages, we think this testimony was incompetent. The rule of recovery is, compensation for the injuries sustained": *Alberti v. New York etc. R. R. Co.*, 118 N. Y. 81, 23 N. E. 35.

In *Johns v. Charlotte etc. R. R. Co.*, 39 S. C. 162, 39 Am. St. Rep. 709, 17 S. E. 698, it was held that in an action to recover for personal injury received through the negligence of a railroad company, the plaintiff might testify to the number and character of his family, if the law of punitive damages is properly given in the charge to the jury. The court said: "Exception 8 alleged error in the ruling of the judge in allowing the plaintiff to testify, over the objection of the defendant, how many people he had to care for and of whom they consisted. If the testimony had gone further in the line indicated, it might have become error, but as it stopped simply at the number and character of his family, we think it was wholly immaterial, and could not affect the result, especially as the judge charged" punitive damages.

It seems that in an action for a private nuisance, affecting injuriously the health of plaintiff and his family, evidence is admissible, and recovery may be had, not only for such injury suffered by plaintiff himself, but also for that suffered by his family, whom he is bound to support: *Pierce v. Wagner*, 29 Minn. 355.

b. Number and Ages of Plaintiff's Children.—The rule is of almost universal application that in an action to recover damages for a personal injury arising from the defendant's negligence where the damages must be compensatory merely, evidence of the number and ages of plaintiff's minor children is inadmissible to enhance damages: *Dayharsh v. Hannibal etc. R. R. Co.*, 103 Mo. 570, 23 Am. St. Rep. 900, 15 S. W. 554; *Stephens v. Hannibal etc. R. R. Co.*, 98 Mo. 207, 9 Am. St. Rep. 336, 9 S. W. 589; *Shaw v. Boston etc. R. R.*, 8 Gray, 45-81; *Chicago v. O'Brennan*, 65 Ill. 160, *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Dreiss v. Friedrich*, 57 Tex. 70; *Kreuziger v. Chicago etc. Ry. Co.*, 73 Wis. 158, 40 N. W.

697; *Williams v. St. Louis etc. Ry. Co.*, 123 Mo. 573, 27 S. W. 397.

In *Pennsylvania Co. v. Roy*, 102 U. S. 459, which is perhaps the leading case upon the subject, the court said: "There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against an objection of the defendant, to give the number and ages of his children, a son ten years of age, and three daughters of the ages, respectively, of fourteen, seventeen, and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted, that is, beyond what was, under all the circumstances a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family, it is impossible to determine with absolute certainty, but the reasonable presumption is that it had some influence upon the verdict."

In an action by a married woman against a city to recover for personal injury received through a defective sidewalk, the damages must be confined to such as she herself sustained, and the fact that she has children, and the number and ages thereof, or that she cared for and maintained them, can form no proper element in the assessment of damages: *Joliet v. Conway*, 119 Ill. 489, 10 N. E. 223, and the rule is the same if the plaintiff is a widow instead of a married woman: *Moore v. Huntington*, 31 W. Va. 842, 8 S. E. 512. In *Gainesville etc. Ry. Co. v. Lacy*, 86 Tex. 244, 24 S. W. 269, an action to recover for personal injury to a married woman, evidence as to the number and ages of her minor children was admitted, and it was held properly admitted to enable the jury to estimate damages as to the value of the loss of her services to her husband and family.

In *Winters v. Hannibal etc. R. R. Co.*, 39 Mo. 468, it was held that in an action to recover for personal injury caused by the negligence of the defendant, the plaintiff may show the number of his minor children dependent upon him for support to enable the jury to estimate the amount of damages. Although not expressly overruled, this case is in effect overruled by the later case of *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207, 9 Am. St. Rep. 336, 9 S. W.

589, wherein it was held that in an action by a servant to recover damages for an injury suffered in obeying an order incurring extra hazard and danger, evidence that plaintiff is a married man, and the number of children he has, is inadmissible where there is nothing to justify the giving of exemplary damages, and the recovery must be entirely compensatory. This last ruling has been uniformly followed in the later Missouri cases: *Dayharsh v. Hannibal etc. R. R. Co.*, 103 Mo. 570, 23 Am. St. Rep. 900, 15 S. W. 554; *Williams v. St. Louis etc. Ry. Co.*, 123 Mo. 578, 27 S. W. 887.

c. Evidence that Plaintiff has Wife and Child or Children.—In actions to recover for personal injuries caused by negligence, the measure of recovery is such damages only as were sustained by the plaintiff himself, and evidence that he is married and has a family consisting of his wife and several small children depending on him for support is incompetent, as the tendency of such evidence is to enhance the damages beyond the sum legally recoverable: *Gallon v. Lauer*, 55 Ohio St. 392, 45 N. E. 1044; *Louisville etc. R. R. Co. v. Gower*, 85 Tenn. 465, 3 S. W. 824; *Kinsley v. Morse*, 40 Kan. 577, 20 Pac. 217; *Burns v. Campbell*, 71 Ala. 293; *San Antonio etc. Ry. Co. v. Robinson*, 73 Tex. 277, 11 S. W. 827; *Mahaney v. St. Louis etc. R. R. Co.*, 108 Mo. 191, 18 S. W. 895; *Stockton v. Frey*, 4 Gill, 188, 45 Am. Dec. 188. Under the same rule it is error to permit the plaintiff to testify that he has a wife, mother, brother, and sister, dependent upon him for support: *Chicago etc. R. R. Co. v. Few*, 15 Ill. App. 125.

Plaintiff's feelings of fear for, or apprehension as to, the future of his wife and children, dependent on him for support, are not to be considered in estimating his damages for a personal injury to himself: *Texas etc. Ry. Co. v. Douglass*, 69 Tex. 697, 7 S. W. 77.

d. In Actions for Injuries to Plaintiff's Child.—In an action by a youth to recover damages for a personal injury the father of the plaintiff, as a witness, was asked, "How many have you in your family and what are your means of support?" and answered such question over objection. The appellate court held that in so far as the evidence or any part of it tended to show merely the father's poverty, and that he had a large family to support, and was sought to be used for the purpose of influencing the jury to increase, and on this account, the damages to be given to the son, the evidence was clearly inadmissible: *Baltimore etc. R. R. Co. v. Shipley*, 81 Md. 368.

e. Error in Admitting Evidence, Correcting by Instruction to the Jury.—Doubtless, error in admitting this character of evidence in this class of cases may be cured by instructions cautioning the jury against increasing the amount of the verdict on account of the plaintiff's having a wife and young children dependent upon him for support. Unless this is done, however, error in the admission of such evidence is ground for reversal of the judgment: *Gallon*

v. Lauer, 55 Ohio St. 396, 45 N. E. 1044. Thus, in an action to recover for an injury caused by the defendant's negligence, testimony by the plaintiff that he has a wife and a small child or children is not calculated to mislead or influence the jury, and is therefore not prejudicial, if by its instruction, the court guides the jury plainly as to the compensatory damages which the plaintiff is entitled to receive, and tells the jury that it must disregard such testimony in arriving at a verdict: **Kinsley v. Morse**, 40 Kan. 577, 20 Pac. 217; **Central etc. Ry. Co. v. Kuhn**, 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441. A similar ruling was made in **Vosberg v. Putney**, 78 Wis. 84, 47 N. W. 99, where the court said: "The plaintiff, if he recovered, was entitled to full compensation for his injury no more and no less, whatever his pecuniary circumstances or those of his father."

II. In Actions Where Injuries have Resulted in Death.

a. Suits by Widows to Recover for Death of Husbands.—In an action by a widow to recover for the death of her husband caused by negligence or other wrongful act, a different rule prevails. If he left minor children surviving him, it is competent for her to show the number of such children and their respective ages, and such evidence may be considered by the jury in estimating the amount of damages resulting from such death. Such evidence is admissible, for the reason that by the death of the father the responsibility of supporting and rearing such children is cast upon the mother, at least during her widowhood; and it is proper to show the extent and character of this responsibility thus cast upon her by reason of the defendant's wrongful act: **English v. Southern Pac. Co.**, 13 Utah, 407, 45 Pac. 47, 57 Am. St. Rep. 772; **Pool v. Southern Pac. Co.**, 7 Utah, 308, 26 Pac. 654; **Chilton v. Union Pac. R. R. Co.** 8 Utah, 47, 29 Pac. 963; **Tetherow v. St. Joseph etc. Ry. Co.**, 98 Mo. 74, 14 Am. St. Rep. 617, 11 S. W. 310; **Soeder v. St. Louis etc. Ry. Co.**, 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714; **Mellia v. Kansas City etc. Ry. Co.**, 115 Mo. 205, 21 S. W. 503; **Schlereth v. Missouri Pac. Ry. Co.**, 115 Mo. 87, 21 S. W. 1110; **Haehl v. Wabash Ry. Co.**, 119 Mo. 325, 24 S. W. 167; **Abbot v. McCadden**, 81 Wis. 563, 29 Am. St. Rep. 910, 51 N. W. 107; **Atchison etc. R. R. Co. v. Wilson**, 48 Fed. 57; **Felton v. Spiro**, 78 Fed. 576; **Baltimore etc. R. R. Co. v. Mackey**, 157 U. S. 72, 15 Sup. Ct. Rep. 491; **Louisville etc. R. R. Co. v. Mahony**, 7 Bush, 235; **Mackey v. Baltimore etc. R. R. Co.**, 19 Dist. Col. 282; **Baltimore etc. R. R. Co. v. Sherman**, 30 Gratt. 602. In such case it is proper to show that plaintiff was his wife in life, and that they had minor children, whom the deceased was, by law, bound to support, and who usually shared his income, and it is wholly immaterial whether such next of kin has or has not other pecuniary resources after his death: **Chicago etc. R. R. Co. v. Moranda**, 93 Ill. 302, 34 Am. Rep. 168.

b. **Suits by or for the Benefit of Other Dependents to Recover for Death of Their Supporters.**—In some instances next of kin who have been dependent on the deceased, in whole or in part, for their support may recover for his death, no matter how remote the relationship: *Chicago etc. R. R. Co. v. Sweet*, 45 Ill. 197, 92 Am. Dec. 207. If, in an action to recover for the negligent killing of an employé, the evidence is circumstantial as to what proportion of the earnings of the deceased were consumed in his own support, it is competent to show how many and what dependents there were who relied upon him, and their ages, as such evidence is a circumstance in determining the pecuniary loss sustained by the decedent's death: *Alabama etc. R. R. Co. v. Jones*, 114 Ala. 521, 62 Am. St. Rep. 121, 21 South. 507. "The fact that there are children or next of kin left surviving, whose support will be thrown on the plaintiff, is proper to be shown in evidence, and to be considered by the jury, but the damages recoverable are those which the widow has suffered and not those which the children have suffered": *Abbott v McCadden*, 81 Wis. 563, 29 Am. St. Rep. 910, 51 N. W. 1079. "As the damages to be assessed were to compensate the widow and children for their loss, it was proper to inform the jurors by competent evidence how many children there were, and the treatment that the deceased gave his family, because its value would depend on the kind of attention and care given, and it was proper to inform the jurors that they might take into consideration the number and ages of the children, because young children should receive more care and training, and they would be likely to need and receive it longer than children of mature years, and it would be more valuable to them": *Chilton v. Union Pac. Ry. Co.*, 8 Utah, 51, 29 Pac. 963. In *Bromley v. Birmingham etc. R. R. Co.*, 95 Ala. 397, 11 South. 841, the court held that evidence that the deceased left a wife and minor child dependent upon him is not admissible unless followed by an offer to prove his expenditures on their account, and the court said: "Plaintiff offered to prove that his intestate left surviving him a wife and minor child dependent upon him for support, but, upon objection, this evidence was excluded. There is hardly enough in the record to enable the court to say this was error. If plaintiff had offered to follow up such proof with evidence that the deceased expended the whole or a part of his earnings upon his wife and child, the evidence should have been admitted. The mere fact of relationship, although it is one which apparently indicates dependence, without proof of expenditure in that direction affecting the net income cannot strengthen the right to recovery, or affect the measure of damages": *Bromley v. Birmingham etc. R. R. Co.*, 95 Ala. 405, 11 South. 841. It has been held, however, that the fact that some of the children of the deceased testified to as being dependents were in fact adults, and that their existence could not, therefore, enhance the damages, cannot be made an issue for the first time on appeal, when no

objection was made to the evidence in the trial court: *Hughes v. Richter*, 161 Ill. 409, 43 N. E. 1686. A few cases are found which maintain that in an action by a widow to recover for the death of her husband caused by negligence it is error to admit in evidence the number of dependent children left by the deceased, as such evidence is calculated to mislead the jury: *Kesler v. Smith*, 66 N. C. 154; *Beems v. C. R. I & P. R. R. Co.*, 58 Iowa, 150, 12 N. W. 222; and it has also been held that it is error to instruct the jury that they have the right to take into consideration the number of the family of the deceased in estimating damages, as the latter can only be founded on the pecuniary loss sustained: *Illinois Cent. R. R. Co. v. Ashline*, 56 Ill. App. 475. In the case of *Consolidated Coal Co. v. Maehl*, 130 Ill. 552, 22 N. E. 715, however, the ruling in *Beard v. Skeldon*, 113 Ill. 584, was followed to the effect that the jury may allow all such pecuniary damages sustained by plaintiff as are the direct result of the death of her husband, and in making their estimate of the damages, may take into consideration whether or not the deceased left, surviving him in addition to his widow, any children.

STUCKEY v. ATLANTIC COAST LINE RAILROAD CO.

[60 S. C. 237, 38 S. E. 416.]

NEGLIGENCE—EVIDENCE.—In an action to recover for personal injury resulting from the way in which cars are coupled, an allegation as to a warning given to a conductor of his negligence in coupling cars some days before the accident is a proper allegation of negligence, and proof thereof is properly admitted thereunder. (p. 845.)

DAMAGES FOR PERSONAL SUFFERING.—The suffering of a person whose injury results in death, and of beneficiaries caused by witnessing such suffering, is not an element of damages for negligence in causing the death. (p. 845.)

EVIDENCE.—ERROR IN ADMITTING EVIDENCE IS CURED by explicit instructions to the jury to disregard such evidence. (p. 845.)

DAMAGES FOR CAUSING DEATH.—WOUNDED FEELINGS AND GRIEF OF BENEFICIARIES producing personal injury may be considered by the jury in estimating damages for a death caused by negligence. (p. 846.)

The following is the charge of the trial court in so far as it recites the statute upon which the principal case is based: "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if the death had not ensued, have

entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony." And the second section is: "Every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused; and if there be none such, then for the benefit of the heirs at law or distributees of the person whose death shall have been so caused as may be dependent for a support, and shall be brought by or in the name of the executor or administrator of such person. And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate." While the opinion directs other matters to be included in the report, we omit them because they are not essential to an understanding of the case.

J. T. Barron and Purdy Reynolds, for the appellant.

Frasers & Cooper and T. S. Moorman, for the appellee.

249 McIVER, C. J. This action was brought by the plaintiff and administrator of Sarah P. Dixon, deceased, against the Atlantic Coast Line Railroad Company of South Carolina, to recover damages for the alleged negligent killing of his intestate by the defendant company, for the benefit of the children of the deceased, under the provisions of an act, usually designated as "Lord Campbell" act, incorporated as sections 2315 to 2318 of the Revised Statutes of 1893. It appears from the "case" that a motion was made before his honor, Judge Buchanan, by the defendant company to strike out paragraph 5 of the complaint, upon the ground that the allegations therein contained were irrelevant to the case as made by the complaint. This motion was refused, which was duly excepted to by defendant company, and notice of intention to appeal therefrom upon the rendition of the final judgment. Subsequently thereto the defendant company filed its answer, in which, "protest-

ing against being required to join issue upon allegations contained in paragraph 5 thereof [the complaint], and reserving the right to object to all testimony relating thereto, it denies the truth of the allegations contained in said paragraph 5 thereof." The case came on for trial before his honor, Judge Townsend, and a jury, and a verdict having been rendered in favor of the plaintiff, the defendant moved for a new trial on the minutes, which was refused; and defendant gave notice of intention to appeal from the judgment entered upon the verdict, as well as from the order of Judge Buchanan, above referred to, and the order of Judge Townsend refusing the motion for a new trial upon the minutes, upon the exceptions set out in the record, which, together with the charge of the circuit judge, should be reported with this case.

These exceptions substantially raise the following questions:
250 1. Whether there was an error on the part of Judge Buchanan in refusing the motion to strike out paragraph 5 of the complaint; 2. Whether there was error on the part of Judge Townsend in his ruling as to the admissibility of certain testimony; 3. Whether there was error in the charge to the jury either of omission or commission.

For a proper understanding of the first question, it will be necessary to set out paragraph 5 of the complaint, as well as to state the nature of the case as made by the complaint. So much of the allegations of the complaint as are pertinent to this immediate inquiry may be substantially stated as follows: That on the 1st of October, 1898, plaintiff's intestate purchased a ticket from Sumter to Bell's Crossing, and boarded the defendant's train at Sumter as a passenger, to be carried to Bell's Crossing; that when the train reached Bishopville, a railroad station between the city of Sumter and Bell's Crossing, the forward portion of the train attached to the engine was separated from the passenger coach, in which intestate was seated, and the same was left standing on the main track, while the other portion of the train to which the engine was attached, was moved off to a sidetrack; and that when the engine was brought back on the main track for the purpose of being coupled to the passenger-coach, it was run back so rapidly and with such great force and violence as to throw the intestate upon the floor of the coach, whereby she sustained serious bodily injuries, which resulted in her death on the sixth day of November, 1898. Paragraph 5 of the complaint reads as follows: "That plaintiff is informed and believes that from time to

time, for ten days before the said collision at Bishopville on the said first day of October, 1898, a portion of said train to which the engine was attached had been, negligently and without due regard to the lives and safety of the passengers on said train, run against that portion of said train to which the passenger-coach was attached; and the conductor of said train of cars had been warned by a passenger on said train, on or about the twenty-first day of September, 1898, that unless ²⁵¹ more care was taken by his engineer in striking the said two portions of said train together, some passenger would be seriously injured. That notwithstanding said warning, the portion of the train to which the engine was attached was run against the portion of the train to which the passenger-coach was attached on the said first day of October, 1898, as above referred to." It seems to us that these allegations were not irrelevant to the case as made by the complaint; for, if true, they tended to show that the very thing which it was alleged caused the injury complained of in this case had been called to the attention of the conductor but a few days before, as dangerous; and that notwithstanding such warning, a few days afterward the disaster complained of did occur from the very same cause which the conductor had been warned was likely to produce such a result. We do not think that there was any error on the part of Judge Buchanan in refusing the motion to strike out the fifth paragraph of the complaint for irrelevancy. The first exception is overruled.

Proceeding, then, to the second general question, as to errors in the ruling as to the competency of testimony—the second, third, fourth, and fifth exceptions are based upon objections to the testimony of the witnesses, W. R. Law, B. A. Pressley, and R. E. Carnes, who were offered to sustain the allegations of paragraph 5 of the complaint; and what we have already said, in considering the first exception, is sufficient to dispose of these exceptions. For if the allegations in that paragraph are pertinent to the issues, then, of course, any testimony (otherwise competent) tending to sustain such allegations would be competent—that is to say, could not be held to be irrelevant. We may add, however, in reference to the third exception, that even if the circuit judge did give an unsound reason for his ruling (as to which we need not inquire), that would not affect the question; for, as has been frequently held, the question for this court is whether the ruling of judgment appealed from is right, and not whether the reasons given for such

ruling or judgment ²⁵² are sound. And as to the fifth exception, we may add that when it was developed that the testimony of the witness, Carnes, as to violent shocks in coupling cars, did not relate to occurrences within the ten days mentioned in the fifth paragraph of the complaint, that portion of his testimony was ruled out. Exceptions 2, 3, 4, and 5 are overruled.

The sixth exception imputes error in allowing the witness, Mrs. Kelly, a daughter of the deceased, to testify as to the suffering her mother endured by reason of the injuries she received, and the effect of such suffering upon the witness, upon the ground "that the suffering of Mrs. Dixon formed no part of the cause of action of the plaintiff." While it is true that the circuit judge did, in the first instance, overrule this objection, yet such error (assuming it to have been an error) was rendered absolutely harmless by the positive instruction given to the jury, that they could not consider as an element of the damages in this case, either the sufferings of the deceased or the grief of the beneficiaries, or any one of them, occasioned by witnessing such sufferings. For the circuit judge expressly charged defendant's fifth request, which was as follows: "No matter how much Mrs. Dixon, the deceased, may have suffered from the time of the alleged injury to the time of her death, this is not a proper element of damage, and the jury cannot take that into consideration in making up its verdict." And he emphasized this instruction by adding the following words: "I charge you that, no matter how much she suffered, you cannot consider her suffering as a part in making up your verdict as to damages." And he also charged defendant's eighth request in these words: "The jury cannot take as an element of damage the grief suffered by the children of Mrs. Dixon, or any of them, occasioned by witnessing her suffering." So that, even conceding that there was error in the ruling as to the admissibility of the testimony of Mrs. Kelly, such error was rendered entirely harmless by these explicit instructions to the jury.

²⁵³ Exceptions 7, 8, and 9 will be considered together, as they all impute error to the circuit judge—to use the language of counsel for appellant in his argument here—"in refusing to charge the jury that they could not take into consideration the wounded feelings of the beneficiaries their grief and sorrow, and in charging them that the jury might take them into consideration, if they found that there was grief and that

it produced an injury." It seems to us that the question presented by these exceptions has been conclusively settled by the views presented in the case of *Nohrden v. Northeastern R. R. Co.*, 59 S. C. 87, 82 Am. St. Rep. 826, 37 S. E. 228. But counsel for appellant has, according to the proper practice, asked and obtained leave to review that case; and we have thus had the benefit of a full and elaborate discussion of this question on both sides, to which we have listened with much interest. We must say, however, that we see no reason for departing from the view taken in *Nohrden's* case, based as it is on the express terms of our own statute, as construed in the previous case, of *Petrie, Strother*, and the other cases cited in the case of *Nohrden*, which carried to their logical result the views presented in the preceding cases; and we do not deem it at all necessary to go over the argument again. Exceptions 7, 8, and 9 are overruled.

The tenth exception, which imputes error to the circuit judge in refusing the motion for a new trial on the minutes, is disposed of by what has already been said, and must therefore, be overruled.

The judgment of this court is, that the judgment of the circuit court be affirmed.

Damages for Causing the Death of a Human Being are generally confined to the pecuniary loss sustained by the surviving kindred, without any allowance for their mental suffering, or for the suffering of the deceased: See the monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 875, 877. Consult, further the recent cases of *Nohrden v. Northeastern R. R. Co.*, 59 S. C. 87, 82 Am. St. Rep. 826, 37 S. E. 282; *Missouri Pac. Ry. Co. v. Moffatt*, 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837; *Florida etc. R. R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149, 25 South. 888.

BROCK v. KIRKPATRICK.

[60 S. C. 322, 38 S. E. 779.]

JUDGMENTS AGAINST EXECUTORS ARE NOT BINDING ON THE HEIRS. Therefore, in an action against them to enforce against lands devised the payment of a judgment against an executor founded on a note they may assert any defense to which the note was subject. (pp. 860, 863.)

PRACTICE—ACTION. ON JUDGMENT.—LEAVE OF COURT is not necessary to enable the creditor of a decedent to institute an action against the devisee on a judgment obtained against the executors to subject the land devised to the payment of his debt. (p. 851.)

EXECUTORS AND ADMINISTRATORS—JUDGMENTS AGAINST RIGHT TO ENFORCE AGAINST DEVISEE—The right of the creditor of a decedent to have his judgment against the executors paid out of land devised to a third person cannot be affected by any derangement it may cause of the testator's plan for the division of the estate. (p. 851.)

LIMITATIONS OF ACTIONS—CHARGING DEVISEES.—The statute of limitations does not run so as to protect a devisee in possession against his liability to pay the testator's debts until after the remedy has been exhausted against the executor. (pp. 858, 859, 864.)

Everything necessary to an understanding of the case is stated in the opinion of the circuit court, which follows:

"The plaintiffs sue to subject land devised to defendants to the payment of a judgment in plaintiffs' favor, against the executor of devisor. The defendants, among other things, allege as a defense: 1. That the note sued to judgment is barred by the statute of limitations; 2. That the land devised was the homestead of devisor, and is now exempt from levy and sale to pay the devisor's debt; 3. That the executor, against whom judgment was rendered, owns other land than that in controversy, which is liable for the payment of the judgment; 4. That the devisor in her lifetime executed deeds of other lands to other of her children, and the land devised to defendants was but part of the ancestor's scheme to make an equal division of her estate, and it would be inequitable to allow plaintiffs in this action to upset that scheme.

"At the call of the cause, the defendants demurred to the complaint on three grounds, to wit: 1. Because it fails to state the date or amount of the note sued to judgment; 2. Because the plaintiffs' cause of action is on the note, and not on the judgment, and the cause of action on the note must be alleged in the complaint; 3. Because, if the plaintiffs' cause of action is on the judgment, the complaint does not allege a previous leave of a court to bring the action: Code, sec. 91.

"Thereupon the plaintiffs demurred to the defenses hereinbefore recited, as follows, to wit: 1. Because it is immaterial to the defendants when the cause of action accrued upon the note, the plaintiffs having right to bring the action . . . at any time within six years after their remedy against the executor has been exhausted; 2. Because the answer does not allege that the land is worth less than the homestead, and does not allege that anyone is entitled to a homestead in the land at this time, or that it was ever set off to testator for a homestead; 3. Because it is immaterial how much land the execu-

tor owns in his own right, unless it is alleged he has in his possession property of the testator; 4. Because any right which defendants may have to demand contribution at the hands of other grantees of the testator cannot affect the right of plaintiffs to demand the relief sought.

"The issues thus joined are all of law. The action is in form a creditors' bill, omitting the executor of testatrix as a party, to reach assets not amenable to the execution issued on a judgment against the executor. The action might have been brought at law. The complaint does allege the rendition of a judgment against the executor, and the return of nulla bona, and the necessity for this action; but it also alleges the existence of the note sued to judgment, so that defendants can plead any defense to which the note may be subject. The first and second ground of defendants' demurrer are, therefore, overruled.

"Nor can the third ground of demurrer be sustained, for this is not an action on a judgment, within the meaning of section 91 of the Code of Civil Procedure.

"I shall now consider the four grounds of the plaintiffs' demurrer to the defenses set up in the answer, and in an order inverse to that hereinbefore stated. The fourth ground is sustained. The right of the plaintiffs to have the debt paid out of the assets of her who contracted the debt cannot be affected by any derangement it may cause of the debtor's plan for the division of her bounty.

"The third is sustained. The plaintiffs are creditors of testator; they may also have a valid judgment against the executor of testator; but they may pursue either.

"The second ground of demurrer is also sustained; not, however, because defendants are not entitled to claim homestead, but because the facts which condition that right are not alleged in the answer. It does not appear from the answer what is the value of the land; it does not appear, in that paragraph of the answer which pleads the right of homestead, how the defendants are related to the original debtor; it does not there appear in what persons the right of homestead exists. When the proper allegations have been made, it will be time enough to adjudge the right of homestead. That question is reserved.

"And now I come to consider the first ground of plaintiffs' demurrer—that to the first stated defense in the answer. That defense alleges that the note of testatrix, sued

to judgment against the executor, was at the commencement of this action barred by the statute of limitations. The testatrix, Jane Taylor, died December, 1888; her note was sued to judgment on the 21st of March, 1895, in an action against her executor, R. T. Kirkpatrick (paragraphs 2 and 4 of the complaint). The defendants are devisees of Jane Taylor, and at the commencement of this action were in possession of the land in dispute, and claimed to be the sole owners thereof (paragraph 6 of the complaint). It does not appear from any admitted allegation at what time defendants so went into possession, whether before or after judgment; but the fact is, it was before judgment, and I so assume. The plaintiffs had no right to sell the land under their judgment and execution, because they had no lien on it; why no lien it is not exactly clear, but it is so held. The plaintiffs' right to subject the land to the payment of their debt does not, therefore, depend on the existence of a lien, but the right depends, first, upon the existence of a valid debt of the ancestor and the possession by defendants (as volunteers) of the ancestor's property, which property is in good conscience first applicable to the payment of debts. What, therefore, is plaintiffs' cause of action against defendants? And cause of action does not necessarily mean a contract relation betwixt plaintiffs and defendants. There can be no question that plaintiffs' cause of action consists in the holding a valid debt against the testatrix, and the possession by defendants, as volunteers, of property liable for the payment thereof. These two facts give the legal right. When did the legal right called cause of action accrue? The plaintiffs contend, only when the plaintiffs' remedy against the executor was exhausted—that is, when judgment was rendered, execution issued, and nulla bona thereon returned. But as I conceive the law, the plaintiffs had the right to pursue the devisees independent of the executor, and whether the executor had assets or not. The reason of this is made plain by Chancellor Harper, in *Vernon v. Falk*, 2 Hill Eq. 259-261. If the plaintiffs had this right of pursuit, it 'accrued' at that specific time when they held a past due obligation of the testator, and the defendants held property of the testator liable therefor. The judgment against the executor is *res inter alios acta*, cannot affect the defendants' rights, and, therefore, need never have been rendered. It is well settled that in a proceeding to subject descended real estate in the hands of the (devisee) to the payment of the debts of the ancestor, a

judgment obtained against the (executor) does not preclude the (devisee) from making any defense to which the claim upon which such judgment has been obtained may be subject': Wilson v. Kelly, 19 S. C. 166. Some of the judges have held that a devisee was privy to a judgment rendered against the executor: Johnson, J., in McMullin v. Brown, 2 Hill Eq. 460. But others have held that 'such judgment is at most only prima facie evidence of the validity of the claim.' and that a devisee's property cannot be taken until he has been heard: Vernon v. Falk, 2 Hill Eq. 259; Wilson v. Kelly, 19 S. C. 168. The last seems the most approved doctrine. I have carefully read Lanier v. Griffin, 11 S. C. 566. That judgment is based on Judge Johnson's opinion on circuit, in McMullin v. Brown, 2 Hill Eq. 462. The court of appeals did not sustain all the conclusions of the court below; and the same court of appeals lays down principles in Vernon v. Falk, 2 Hill Eq. 259, which are antagonistic to the conclusions of Judge Johnson.

"My opinion is, if the facts so stated as the cause of action herein existed more than six years before this action was begun, the statute may be pleaded against the enforcement of the obligation. The first ground of plaintiffs' demurrer is, therefore, overruled."

W. N. Graydon, for the appellants.

M. P. De Bruhl and F. B. Gary, for the appellees.

BENET, A. J. The plaintiffs brought this action to subject lands, devised to the defendants, to the payment of debts of the devisor. The main facts in the case are these:

1. The devisor, Jane Taylor, died on 15th December, 1888, leaving a will of which R. T. Kirkpatrick was made executor;
2. By her will she devised to the defendants each a tract of land, into the possession of which they immediately entered, and of which they are still in actual and exclusive possession;
3. After the devisor's death, at some time before March, 1895, the plaintiffs recovered judgment against the executor on a note given by the devisor, in the court of common pleas for Abbeville county.
4. On the 21st of March, 1895, the plaintiffs, in a proceeding to prove said judgment, recovered judgment in the court of probate against the executor, which was duly docketed and became a judgment of the court of common pleas;
5. It is not claimed that the defendants herein were parties ³³⁷ to any of these proceedings, but it appears that the

executor was the sole defendant; 6. Execution was issued, and returned nulla bona; 7. The debt is still unpaid.

The plaintiffs seek to subject the lands devised to the defendants to the payment of this debt of the devisor. The defendants stand on several defenses; but the main defense is that the note sued to judgment is barred by the statute of limitations, that it was a promissory note, and the cause of action accrued more than six years before the commencement of this action on the 21st of April, 1899. The report of the case will set forth in full the complaint, the answer, the grounds of the defendants' demurrer to the complaint, the grounds of the plaintiffs' demurrer to the answer, the decree of the circuit judge, the plaintiffs' exceptions to the decree, and the defendants' exceptions thereto.

The cause was heard on circuit by his honor, Judge Gage, upon the pleadings. In his decree he overruled the defendants' demurrer, sustained several of the grounds of the plaintiffs' demurrer, but overruled the first and most important, which reads as follows: "That it is immaterial to the defendant when the cause of action accrued upon the note, the plaintiffs having the right to bring the action to subject lands devised to the payment of the debts of the testatrix at any time within six years after their remedies against the executor have been exhausted." With regard to the defendants' demurrer which was overruled, and that portion of the plaintiff's demurrer which was sustained, it is sufficient to say that we agree with the judge in his decision, and we adopt that part of his decree as expressing the opinion of this court on the points involved. We do not, however, agree with him in his decision overruling the first ground of plaintiffs' demurrer, quoted above, but are of the opinion that it should have been sustained. In his decree the judge said: "There can be no question that plaintiffs' cause of action consists in holding a valid debt against the testatrix, and the possession by defendants, as volunteers, ²²⁸ of property liable for the payment thereof. These two facts give the legal right. When did the legal right called cause of action accrue? The plaintiffs contend only when the plaintiffs' remedy against the executor was exhausted—that is, when judgment was rendered, execution issued, and nulla bona thereon returned. But, as I conceive the law, the plaintiffs had the right to pursue the devisees independent of the executor, and whether the executor had assets or not. The reason of this is made plain by Chancellor Harper in *Vernon v. Valk*, 2 Hill

Eq. 259-261. If the plaintiffs had this right of pursuit, it accrued at that specific time when they held a past due obligation of the testatrix, and the defendants held property of the testatrix liable therefor. The judgment against the executor is *res inter alios acta*, cannot affect the defendants' rights, and, therefore, need never have been rendered. . . . My opinion is, if the facts so stated as the cause of action herein existed more than six years before this action was begun, the statute may be pleaded against the enforcement of the obligation. The first ground of plaintiffs' demurrer is, therefore, overruled."

The part of the demurrer thus overruled was directed against the first defense of the defendants, in which they pleaded the statute of limitations as a bar to any recovery against them on the debt of their ancestor. Taking the facts alleged to be true, for the purposes of the demurrer, we do not think the defendants could plead the statute as a defense; and it is our opinion that the learned judge erred in holding it was a good defense, and in overruling the first ground of plaintiffs' demurrer. And we shall proceed to set forth briefly the reasons for our decision. The word "briefly" is used advisedly, for there is, we confess, a strong temptation to write a long and elaborate review of the cases in which the law involved has been considered and discussed by the courts of this state. It was in *D'Urphey v. Nelson*, 1 Brev. 289, decided in 1803, by the constitutional court, that the first opinion was filed upon the effect ⁸³⁹ on lands descended or devised of a judgment against the administrator or executor recovered on a debt of the intestate or the devisor. This was followed, in 1827, by *Martin v. Latta*, 4 McCord, 128; and from that time to the present these two cases have been regarded as the common source of the law on this interesting subject. These cases did much to settle the law, aided greatly, however, by the application of the principle of *stare decisis*. For the doctrines laid down were not received with favor, and the law was so long in doubt that it "seriously embarrassed the bench and bar for a long period of time," as said Mr. Justice Willard, in his dissenting opinion, in *Rogers v. Huggins*, 6 S. C. 377. Learned judges and prudent chancellors, like Colcock, Dunkin, and Harper, did not hesitate in their written opinions to express their regret that the law had been so decided: *Martin v. Latta*, 4 McCord, 128; *Bird v. Houze*, Spear Eq. 252; *Vernon v. Valk*, 2 Hill Eq. 261. But, like Judge O'Neill, in *Jones v. Wightman*, 2 Hill, 250, they regarded the two leading cases "as authority not to be questioned by either the bar or the

bench; and that the court would not only act unwisely, but with a rashness utterly reckless of consequences, were they now to undertake to review and reverse those cases." The construction put upon the statute of 5 George II, chapter 7, in *D'Urphey v. Nelson*, 1 Brev. 289, has thus become the settled law of the state—namely, that the lands descended are liable for the payment of the ancestor's debt, and may be sold under a judgment recovered on that debt against the administrator, although the heirs were not parties to the action. So, also, section 2080 of the Revised Statutes, makes lands devised liable for the payment of testator's debts; while section 2000 makes all devises "absolutely and utterly void" against creditors by bond or specialty.

The general proposition—that lands descended or devised may be subjected to the payment of the debts of the intestate or the testator—is plain and easily understood, but the application of it as a rule of law has frequently been attended with great difficulty. Different cases presented each a different state of facts, and this law in favor of creditors had to be regarded from different points of view. Could this rule be applied, whether the heirs or devisees were or were not in the actual and exclusive possession of the land? Could it be applied as well after as before partition? Could exclusive possession by the heirs or devisees for a sufficient length of time prevent the application of the rule, the creditor thus losing his right by laches? These and cognate questions came before the courts for adjudication in numerous cases, and the long line of opinions in our reports settling these questions attest as well the difficulty of the subject as the learning, labor, and research of the justices who delivered them. Some of those opinions present a careful and exhaustive review of all the cases from *D'Urphey v. Nelson*, 1 Brev. 289, down, and they succeed in reconciling views which at first sight may seem to be irreconcilable; for example, the opinion of the court, by Mr. Chief Justice Moses, in *Rogers v. Huggins*, 6 S. C. 356, and the learned and elaborate opinion by Mr. Chief Justice McIver, in *Huggins v. Oliver*, 21 S. C. 147, in which latter case there is a complete and instructive review of almost every decision on the subject. After careful and repeated perusal and consideration of all the cases, the writer of this opinion came to the conclusion that it would be supererogatory, however interesting, to prepare a thorough, analytical review of all of them—to attempt to do again what has already been so well done. He,

therefore, contents himself with stating briefly the results of the labors of his predecessors, as disclosed by the leading cases.

It has already been shown that the case of *D'Urphey v. Nelson*, 1 Brev. 289, decided that the statute of George II makes the land of a deceased person assets in the hands of his personal representatives, and thus liable for the payment of the debts of the deceased. The case of *Martin v. Latta*, 4 McCord, 128, simply reaffirms the law as laid down in *D'Urphey v. Nelson*, 1 Brev. 289. In neither case did it appear that the heirs or distributees had ever been in possession of the land; but, on the contrary, it was shown in both cases that a purchaser was in possession. ³⁴¹ Consequently nothing was said in either case about the rights of heirs or devisees in actual and exclusive possession before judgment recovered against the administrator or executor. In *Jones v. Wightman*, 2 Hill, 250, the plaintiff was in possession as purchaser under a judicial sale for partition. While still adhering to the rule established in *D'Urphey's* case as applicable when the heirs held the land as descended estate, and whether in actual possession or not, Judge O'Neill delivering the opinion of the court, held that the rule did not apply after the lands had been partitioned and purchased from the heirs by a third person. It thus appears that lands descended or devised cannot be subjected to payment of ancestor's debt, when by partition or other acts of law the character of the possession is changed, and becomes exclusive in the heirs or devisees. *Bird v. Houze*, Spear Eq. 250, marks another step forward in the progress of the doctrine under discussion. Chancellor Dunkin, while dissatisfied with the decision in *D'Urphey's* case, still recognized it "as a settled law of property," but held in *Bird's* case that the exclusive possession of the heirs, and acts of ownership exercised by them, protected their inheritance from levy and sale under an execution against the personal representative of their intestate. This does not mean that the mere fact of actual and exclusive possession in the heir will prevent the application of the rule in *D'Urphey's* case. Such a construction would amount to a practical abrogation of the rule; for, as was pointed out by Mr. Chief Justice Moses, in *Rogers v. Huggins*, 6 S. C. 356: "In the very large proportion of the instances in this state (and the case before us presents one), they upon whom the inheritance is cast are in possession at the very moment of the death of the ancestor, for in nine cases out of ten they are members of his own household." The reasonable construction of the decision in *Bird v. Houze*,

Spear Eq. 250, is that while lands in the actual and exclusive possession of the heirs, and over which they have exercised acts of ownership, may not be sold under a judgment against the administrator upon the debt of the intestate—and that, too, although ²⁴² no regular partition has been made—yet may they still be subjected even in the hands of the heirs to the payment of the ancestor's debts in a proceeding instituted for that purpose, to which proceeding the heirs would be necessary parties. The judgment of the court in *Bird v. Houze*, Spear Eq. 250, was based on the additional ground of laches. It appeared that nothing had been done for ten years after the judgment had been recovered, and the heirs had been left in undisturbed possession for twelve years. "After such laches," said the court, "it is too late to resort to the heir." This was the first case in which the fact of actual and exclusive possession in the heir was before the court. It was the first, also, in which the heir had a defense which the administrator had failed to interpose—namely, the statute of limitations, which was sustained. And the decision of the court in that important case went no further than this: That lands descended and in the actual and exclusive possession of the heir may not be subjected to the payment of the ancestor's debt without giving the heir notice and an opportunity to defend—that is, in a proceeding to which he would be a necessary party. This just interpretation shows that there is no conflict between the cases of *D'Urphey v. Nelson*, 1 Brev. 289, and *Bird v. Houze*, Spear Eq. 250.

Another instructive case is *Rogers v. Huggins*, 6 S. C. 356. It has gone further than any other case, as was said by Mr. Chief Justice McIver, in *Huggins v. Oliver*, 21 S. C. 147. It decided that the mere fact that the heirs of an intestate were in possession of the land, would not defeat the right of a creditor to have the same sold under a judgment obtained against the administrator upon a debt of the intestate. And in that case it was conceded that after partition lands of the intestate cannot be sold under a judgment against the administrator. The opinion was delivered by Moses, C. J., Willard, A. J., dissenting.

We now come to those cases which are particularly referred to by Judge Gage in his decree in the case at bar. The learned judge says: "I have carefully read *Lanier v. Griffin*, 11 S. C. 566. That judgment is based on Judge Johnson's opinion on circuit, in *McMullin v. Brown*, 2 Hill Eq. 462. The court of appeals did not sustain all the conclusions of the court below; and the same court of appeals lays down principles in *Vernon*

v. Valk, 2 Hill Eq. 261, which are antagonistic to the conclusions of Judge Johnson." In McMullin v. Brown, 2 Hill Eq. 462, one of the questions raised in the defense was, "whether the plaintiff's rights against the defendant are not barred by the statute of limitations." The court held that the statute of limitations will not run so as to protect a legatee against his liability to pay testator's debts until after the remedy has been exhausted against the executor—that no cause of action accrued against the heir or legatee until then. It appeared that the legatees had been in possession of their legacies from 1816 to 1817, and that the bill which was brought by the creditor of the testator against the legatees was not filed until 1829. It was held, however, that the suit had been brought in due time, as the cause of action did not arise until judgment had been recovered against the executor, and a deficiency of assets established, so as to enable the legacies to be followed. The case of Lanier v. Griffin, 11 S. C. 566, referred to by Judge Gage, expressly reaffirms and corroborates this decision in McMullin v. Brown, 2 Hill Eq. 462. The opinion was delivered by Mr. Chief Justice Willard, who used the following language: "It was held that the suit [in McMullin v. Brown] had been brought in due time; as the cause of action did not arise until judgment had been recovered against the executor, and a deficiency of assets established, so as to enable the legacies to be followed. In that case, the question whether the creditor was barred as against the legatee was considered independently of the question whether such a suit by the executor would have been so barred."

But, conceding that Lanier v. Griffin, 11 S. C. 566, accords with McMullin v. Brown, 2 Hill Eq. 462, Judge Gage says in his decree that the same court of appeals which rendered the decision in McMullin v. Brown, 2 Hill Eq. 462, laid down principles in Vernon v. Valk, 2 Hill Eq. 261, which are ³⁴⁴ antagonistic to the conclusions of Judge Johnson in the former case; and that, moreover, all of his conclusions were not sustained. The circuit judge does not set forth the antagonistic conclusions, nor does he indicate which of Judge Johnson's conclusions were not sustained.

A careful consideration and analysis of the decisions referred to fails to discover points of actual difference or of antagonism. Vernon's case was decided in March, 1835; McMullin's in December, 1836. The court of appeals that heard Vernon's case consisted of Judges Johnson, O'Neill, and Harper. The court of appeals that decided McMullin's case was com-

posed of Chancellors D'Saussure, Johnson, Harper, and Johnston, and of Judges O'Neill, Gantt, Richardson, Evans, Earle, and Butler. The report of McMullin's case shows that while Chancellor Johnston delivered the opinion of the court, Chancellor Harper and Judge O'Neill concurred with the others in the decision. It thus appears that the same three learned judges were of one mind in Vernon's case and in McMullin's case. It is not easy to believe that, in so short a space of time and on a subject of so much importance, those three eminent men could have given their sanction to antagonistic opinions. There is one slight semblance of difference of opinion in those two cases. In *Vernon v. Valk*, 2 Hill Eq. 259-261, we find Chancellor Harper saying this, with reference to the cases of *D'Urphey v. Nelson*, 1 Brev. 289, and *Martin v. Latta*, 4 McCord, 128: "Notwithstanding our decisions that lands in the hands of the heir may be sold by an execution upon a judgment against the executor or administrator (decisions which, however much we may regret them, have yet obtained too long, and too many rights have been vested under them, to allow us to interfere with them), yet I suppose an action at law might be sustained against the heir alone. There is nothing in these decisions to forbid such an action. In such action, the executor neither would nor could be joined, and it would be immaterial whether there were an executor or administrator in the state or not." To understand clearly the full logical import of the learned ³⁴⁵ chancellor's language, we must look into the facts of the case then before the court. The bill shows that in Vernon's case there was no executor or administrator, and there were no personal assets in the state. A decree had been rendered in New York against the executrix, lately deceased. The chancellor says: "It would be mere mockery that a formal administration should be taken out here, where there are no assets, in order that such formal administrator might be made a party." Keeping these facts in mind, there is no inconsistency between the decisions in Vernon's and McMullin's cases. It is always important to limit the scope of a decision to the special point presented in the case for adjudication. As to other questions not arising in the case, a decision is a mere obiter dictum. It would seem that Judge Gage gave the decision in *Vernon v. Valk*, 2 Hill Eq. 259-261, a larger meaning and a wider and more general application than Chancellor Harper and the concurring justices intended. The judge says in his decree: "The plaintiffs had the right to pursue the devisees independent of the

executor, and whether the executor had assets or not. The reason of this is made plain by Chancellor Harper, in *Vernon v. Valk*, 2 Hill Eq. 259-261. If the plaintiffs had this right of pursuit, it accrued at that specific time when they held a past due obligation of the testatrix, and the defendants held property of the testatrix liable therefor." In this we cannot agree with Judge Gage, being of the opinion that he misunderstood the language and misapplied the doctrine of the decision in *Vernon v. Valk*, 2 Hill Eq. 259-261.

The doctrine applicable to the case before us is that so plainly laid down in *McMullin v. Brown*, 2 Hill Eq. 462, and expressly reaffirmed in *Lanier v. Griffin*, 11 S. C. 566—namely, that the statute of limitations will not run so as to protect a legatee against liability for his testator's debts until after the remedy has been exhausted against the executor—no cause of action accruing against him until that time. What is the true nature of the action at bar? It is not an action to recover from the defendants the amount of a debt due by their ³⁴⁶devisor. It is not to establish a personal demand against them, for they cannot be held liable personally. It is simply an action to subject lands in the possession of the defendants as devisees to the payment of the debt of their divisor. In the apt language of the circuit decree: "There can be no question that plaintiffs' cause of action consists in holding a valid debt against the testatrix and the possession by defendants as volunteers of property liable for the payment thereof." We may adopt and—to suit the facts in this case—adapt the language of Mr. Chief Justice McIver, in a somewhat similar case (*Cleveland v. Mills*, 9 S. C. 436), and say that this is an action to subject the lands of the debtor, Mrs. Taylor, in the hands of the defendants as devisees, to the payment of her debt; and it is founded upon the equity which creditors have to follow the assets into the hands of the heirs and devisees to obtain payment of their debt. The question, therefore, is not whether the defendants owe the debt—for there is no pretense that they ever did—but whether the testatrix ever owed it; not whether the right of action on the debt against the defendants is barred by the statute of limitations—for, strictly, there never was such a right of action—but whether the right of action against the testatrix or her executor is barred. "The only defense, therefore, that could avail the defendants would have been either to show that there was no such debt due by the testatrix, or that the action thereon against her executor was barred by the statute of limita-

tions, which they might do, even though the executor should omit to interpose such a defense (*Bird v. Houze*, Spear Eq. 250); or to show such laches on the part of the plaintiff as would deprive him of the right to invoke the equity powers of the court, as in *Mobley v. Cureton*, 2 S. C. 140; or to have relied upon their own possession for the statutory period, as in *Miller v. Mitchell*, Bail. Eq. 437": *Cleveland v. Mills*, 9 S. C. 437.

The comparatively recent case of *Ariail v. Ariail*, 29 S. C. 84, 7 S. E. 35, was not referred to or cited in the argument of the case at bar, but it was brought to our attention afterward, in ³⁴⁷ accordance with the recognized practice in this court. It is not surprising that counsel for the defendants should regard *Ariail's* case as sustaining their view of the law, for some of the views expressed in that case would seem at first sight to be in conflict with the doctrine so distinctly laid down in *McMullin v. Brown*, 2 Hill Eq. 462, and *Lanier v. Griffin*, 11 S. C. 566. Mr. Chief Justice Simpson, who delivered the opinion of the court, used the following language: "The judgment against the executor then having no effect whatever upon the heirs or devisees, and it being necessary that plaintiffs' cause of action, if any, should be established against them in a suit to which they are parties, as in the case below, we think they had the right to set up any defense available at the time, including the statute of limitations, without regard to the action against the executor of their father in 1883, which, in our judgment, did not arrest the currency of the statute commencing in 1868. Nor was it necessary to have a return of nulla bona on said judgment before action accrued against the devisees: *Reener v. Speake*, 4 S. C. 295; *Lanier v. Griffin*, 11 S. C. 582." If the law here laid down be regarded as a legal principle of general application, there is no doubt that it would be in direct conflict with the decisions of our courts which we have already reviewed in this opinion, and especially with the decisions in *McMullin v. Brown*, 2 Hill Eq. 462, and *Lanier v. Griffin*, 11 S. C. 582. But when the conclusions arrived at in *Ariail's* case are limited in their application to the issues actually involved in that case, the seeming conflict disappears. In that case, the circuit judge had held that the claims of three of the plaintiffs were barred by the statute of limitations. "This question," says Chief Justice Simpson, "which is the main and vital question in the case, depends upon other subsidiary questions which his honor considered and decided, as involved in and leading up

to this main question. They are, therefore, also before us. These questions are: 1. Was the settlement of John Ariail, made before the ordinary of Pickens district in February, 1868, and his discharge an act throwing off his trust such as gave currency to ³⁴⁸ the statute? And, if so, 2. Did his honor err in holding that the statute began to run as to each of the plaintiffs as they reached their majority, respectively, and that each was barred at the end of four years and nine months from said majority, notwithstanding the action of said plaintiffs against the executor of John Ariail, in 1883, and judgment thereon in May, 1885, for the sum of fourteen hundred and fifty dollars and seventy cents, and a return of nulla bona made in July, 1885?" The court affirmed the conclusion of Circuit Judge Fraser, that the settlement and discharge of John Ariail in 1868 was a disavowal of his trust as administrator; that such disavowal necessarily gave currency to the statute; that the plaintiff's action against John Ariail's executor in 1883 did not arrest the statute as to the defendant's devisees, and give it a new starting point either at the commencement of the said action or at the judgment obtained therein in 1885. These important questions being thus settled, the conclusion was unavoidable that the judgment against the executor did not affect the devisees; that the plaintiff's cause of action should be established against them in a suit to which they were parties; that in such suit the devisees had the right to set up any defense available at the time, including the statute of limitations, without regard to the action against the executor of their testator in 1883; and that such action did not arrest the currency of the statute commencing in 1868. Up to this point there is not even the appearance of conflict between the decision of the court in Ariail's case and the doctrines established in the leading cases already referred to: *Vernon v. Valk*, 2 Hill Eq. 259-261; *McMullin v. Brown*, 2 Hill Eq. 462; *Bird v. Houze*, Spear Eq. 250; *Lanier v. Griffin*, 11 S. C. 566; *Rogers v. Huggins*, 6 S. C. 356; *Cleveland v. Mills*, 9 S. C. 436; *Huggins v. Oliver*, 21 S. C. 147.

But the opinion in *Ariail v. Ariail*, 29 S. C. 84, 7 S. E. 35, goes on to say: "Nor was it necessary to have a return of nulla bona on the said judgment before action accrued against the devisees." As a general proposition, this is in obvious antagonism to the rule laid down in *McMullin v. Brown*, 2 Hill Eq. 462, and recognized in several subsequent cases—namely, that the statute of limitations did not run so as to protect a legatee or devisee against ³⁴⁹ his liability for his testator's debts until

after the remedy has been exhausted against the executor, no cause of action accruing against him until then, for the sound reason that until the creditor has exhausted his remedy against the executor or administrator, he cannot certainly know that the assets in the hands of the personal representative would prove insufficient (*McMullin v. Brown*, 2 Hill Eq. 462), or, indeed, that there were no assets in his hands. Was it the intention of the court, in *Ariail v. Ariail*, 29 S. C. 84, 7 S. E. 35, to overrule *McMullin v. Brown*, 2 Hill Eq. 462, and the other cases following in line? We do not think so. No mention is made of *McMullin v. Brown*, 2 Hill Eq. 462, in *Ariail's* case, nor of any desire to overrule or even to modify it. The importance of the law of property involved is too great and far-reaching to permit the supposition that the court intended a result so serious, while giving no intimation of such intention.

When the facts in the case and the circuit decree are considered, it is manifest that the court was not looking beyond those facts, and the issues arising therefrom, when it announced that a return of nulla bona was not necessary before action accrued against the devisees. The report shows that it was admitted that there were no assets in the hands of Gary, the executor. Such an admission made it unnecessary to obtain a return of nulla bona, or to seek a remedy against the executor. That this is all that the court meant is made clear by an examination of the two cases cited by the court—*Reeder v. Speake*, 4 S. C. 293, and *Lanier v. Griffin*, 11 S. C. 582. On the page referred to in the latter case is found the following: "If the executor has assets, or their deficiency has been occasioned by his wrong, the creditor must go against him in the first instance, and exhaust his remedy before he can go against the legatee, as was held in *McMullin v. Brown*, 2 Hill Eq. 462." And in *Reeder v. Speake*, 4 S. C. 293, we find this: "To require the creditor of a decedent to obtain return of nulla bona on an execution against the executor or administrator before he could call for an account in the court of equity, and claim its interference against the descended or ³⁵⁰ devised real estate, would exact a barren form productive of, and ending in, nothing but costs and expenses." From these two cases the court very obviously concluded that in *Ariail's* case, in which it was admitted that there were no assets in the executor's hands, it would be futile and unnecessary to "exact the barren form" of obtaining a return of nulla bona. It will be remembered that in *Vernon v. Valk*, 2 Hill Eq. 259-261, Chancellor Harper held, for somewhat similar

reasons, that where there was no executor or administrator and no assets in this state, "it would be mere mockery that a formal administration should be taken out here where there are no assets, in order that such formal administrator might be made a party"; and that, therefore, the creditor in such a case might bring his action against the heir alone. So that, also, it might well be said that it would be mere mockery to exact a return of nulla bona, when it is admitted that the executor has no assets. And this is all that the court meant when it said in *Ariail's* case, that "it was not necessary to have a return of nulla bona on said judgment against the executor before the action accrued against the devisees." Regarded as the law in *Ariail's* case and applied to the facts involved and the issues raised, this is a sound proposition. But if it is to be regarded as a principle or rule of general applicability, we do not hesitate to say that it is in irreconcilable conflict with the important doctrines established with so much care, labor, and learning in the leading cases we have passed under review and recognized in a long line of subsequent decisions. The former view is, in our opinion, the reasonable exposition of the law in *Ariail v. Ariail*, 29 S. C. 84, 7 S. E. 35. If we could regard the latter as the reasonable view, this court would without hesitation overrule that case, so far as the point in question is concerned. But we do not think it necessary to take that step, being of the opinion that the doctrine laid down in that case is not out of harmony with the decisions in the leading cases to which we have so frequently referred.

In *Huggins v. Oliver*, 21 S. C. 159, to which we have ³⁵¹ already referred, Mr. Chief Justice McIver, after a very thorough and discriminating review of the leading cases, makes much easier the understanding and application of this important law of property by laying down the following rule: "It seems to us that the rule to be deduced from the foregoing cases is this: That while, as a general proposition, it is true that lands of an intestate may be sold under a judgment recovered against the administrator upon a debt of the intestate, yet if the lands have passed into the actual and exclusive possession of the heirs before the judgment has been recovered, and before any lien has thus been fixed upon them, they can no longer be sold under such judgment, and can only be reached by the usual proceedings to subject real estate in the hands of the heir to the payment of the debts of the ancestor—to which proceedings the heir would, of course, be a necessary party. Without this

qualification of the general rule stated in *D'Urphey v. Nelson*, 1 Brev. 289, it would be impossible to reconcile the various decisions to which we have referred, but with it the cases may all be harmonized."

We cannot do better than again announce this excellent rule as the logical result of the numerous decisions on this vexed question. The doctrine which the rule embodies is clearly indicated in *Gilliland v. Caldwell*, 1 S. C. 198. That case has the following: "The statute of George II does not make descended lands in the possession of the heirs liable for the payment of the debts of the ancestor, but the cause of action must be established against them in a suit to which they are parties, and they are not bound by a judgment against the administrator to which they are neither parties nor privies."

When the principle deduced from the cases we have reviewed are applied to the facts in this case, it will easily be seen that the judgment recovered by the plaintiffs against the executor in March, 1895, does not bind the defendants, and the lands in their hands as devisees cannot be sold under that judgment. They were not parties to that suit and thus had no opportunity to dispute the claim. Although the ³⁵² claim was sued to judgment, that fact does not give it any higher rank or greater effect, in so far as the defendants are concerned. As to them it is not *res judicata*. And when, as in this case, the judgment is made the basis of an action to obtain a decretal order to sell the lands in their hands as devisees to pay the debt of their testatrix, they have the right to contest the claim as freely as if it had not ripened into a judgment. They may, as we have already shown, set up the defense that it was not a valid debt against their testatrix, or they may plead laches or any other good defense. They may plead the statute of limitations as running in their favor in a proper case.

But in this case the statute did not begin to run when the plaintiffs held a past due obligation of the testatrix and the defendants held lands devised and liable therefor, as was held by Judge Gage. The statute began to run only after the remedy against the executor had been exhausted. The judgment was recovered in March, 1895, execution issued and nulla bona returned thereon. This action was commenced in April, 1899, only four years after the remedy against the executor had been exhausted. It is clear, therefore, that the statute of limitations could not properly be set up as a defense by these defendants, and that the plaintiffs' first ground of demurrer directed against

that defense should have been sustained; and that it was error in the circuit court to overrule it.

It is the judgment of this court that the decree of the circuit judge herein be reversed, in so far as it overruled the plaintiffs' first ground of demurrer; and that in all other respects the judgment of the circuit court be affirmed, except as to the right of homestead, which was left open by the circuit judge, and that the case be remanded to the circuit court for the purpose of hearing and determining the claim of homestead, with leave to the defendants to apply to that court for such amendments to their answer as may be deemed necessary to bring before the court all such facts as may be pertinent to the claim of homestead.

A Judgment Against a Personal Representative establishing a claim against the estate is not conclusive upon the heirs and devisees; Note to Moore v. Hillebrant, 65 Am. Dec. 124, 125. But see Moody v. Peyton, 185 Mo. 482, 58 Am. St. Rep. 604, 36 S. W. 621; Morris v. Murphy, 95 Ga. 807, 51 Am. St. Rep. 81, 22 S. E. 635; Darron v. Calkins, 154 N. Y. 503, 61 Am. St. Rep. 637, 49 N. E. 61.

Estate of Decedent.—On the liability of devisees and heirs for the debts of their ancestor, see *Smith v. Seaton*, 117 Pa. St. 382, 2 Am. St. Rep. 668, 11 Atl. 394; note to *Shannon v. Dillon*, 48 Am. Dec. 395-397. On the running of the statute of limitations against claims affecting the estate of a decedent, see the notes to *Moore v. Hillebrant*, 65 Am. Dec. 123, 124; *Killough v. Hinton*, 26 Am. St. Rep. 22-29.

CAROLINA NATIONAL BANK v. STATE.

[60 S. C. 465, 38 S. E. 629.]

STATE PRISONS—CONVICT HIRE—RIGHT TO COLLECT.—A superintendent of a state prison has power to collect the hire due the state for convicts. (p. 866.)

NEGOTIABLE INSTRUMENTS—NOTES FOR CONVICT HIRE.—A superintendent of a state prison has no power, express or implied, to take or indorse negotiable notes for convict hire. (p. 866.)

ESTOPPEL AGAINST STATE.—The doctrine of equitable estoppel has no application to a state. Therefore, it cannot be estopped on the ground that its agent acted under apparent authority. (p. 868.)

ESTOPPEL.—THE UNAUTHORIZED ACT OF A STATE OFFICER in accepting, indorsing, and negotiating a note, and placing the proceeds to the credit of the state, does not estop the latter from showing that his act was unauthorized. (p. 868.)

MONEY HAD AND RECEIVED.—THE STATE IS NOT LIABLE as for money had and received, for money placed to its credit by a state officer acting without authority. (p. 869.)

The pleadings and exceptions mentioned in the opinion are not necessary to an understanding of the case.

G. D. Bellinger, attorney general, for the appellant.

Clark & Miller, for the appellee.

⁴⁷² JONES, J. This action was brought pursuant to a joint resolution of the general assembly, approved February 17, 1900 (23 Stats. 554), to test the liability of the state to pay two notes taken by the superintendent of the state penitentiary for the hire of convicts, and by him indorsed to the plaintiff. The appeal comes from an order of Judge Klugh, overruling the state's demurrer to the complaint for insufficiency. The complaint, demurrer, order overruling and the exceptions thereto, are officially reported herewith.

The questions presented by the exceptions may be thus stated: 1. Whether Neal, as superintendent of the state penitentiary, had power to collect and receive the hire due the state for convicts; 2. Whether, if he had such power, he also had power, express or implied, to take negotiable notes therefor, and bind the state by his indorsement thereof to the plaintiff bank; 3. Whether the state is estopped to deny its liability by the alleged acquiescence in and approval of such negotiations, and the retention of the benefits thereof.

The first question has been recently determined by the case of *State v. Neal*, 59 S. C. 259, 37 S. E. 826, where the court held that the superintendent of the penitentiary is criminally liable in failing to turn over to his successor moneys coming into his hands from the hire of convicts, since it was his duty under the statute to receive moneys ⁴⁷³ arising from the hire of convicts. But power to receive money for convict hire does not imply power to bind the state by the officer's indorsement and negotiation of notes taken therefor. No express authority to so pledge the credit of the state is alleged or shown, and no such power can be implied unless it is necessarily incident to the power to receive money for convict hire. It needs no argument to show that the power to pledge the state's credit is not necessary to execute the power to receive money for the state's use. Testing the question by the law of private agency, all the authorities hold that the right of an agent to indorse the principal's name on common paper is not necessarily incident to the agent's power to collect and receive money for the use of the principal. Under this principle, an attorney to sue for, re-

cover, and receive money for his client is not warranted under such authority to assign the judgment obtained: *Noonan v. Gray*, 1 Bail. 437. So strict is the law applicable to commercial paper in this state, an express authority to an agent to indorse commercial paper in the name of the principal will not authorize the agent to receive notice of dishonor, since that is not necessarily incident to the right to indorse: *Valk v. Gaillard*, 4 Strob. 99. All the authorities agree that an agent cannot bind the principal by indorsement of negotiable paper except under an express power to the execution of which such indorsement is essential: 1 Parson on Contracts, 62; 1 Daniel on Negotiable Instruments, 294; Tiedeman on Commercial Paper, 77, 312, 431; *Jackson v. Bank*, 36 Am. St. Rep. 84, and notes. Sometimes the act of the private agent may bind the principal if within the apparent scope of his authority. But in this case, we deal with the act of a public officer, whose authority to act must be real, not merely apparent. A public officer derives his authority from statutory enactment, and all persons are in law held to have notice of the extent of his powers; and, therefore, as to matters not really in the scope of his authority, they deal with the officer at their peril: *Bond Debt Cases*, 12 S. C. 200; 19 Am. & Eng. Ency. of Law, ⁴⁷⁴ 506, and cases cited in the note on page 507. Whether the United States supreme court, notwithstanding the inhibition of suits against the state without its consent rightfully assumes jurisdiction of a suit against a state officer, it is upon the ground that the officer's act is not state action, but the individual act of the person holding the office, in cases where the officer's act is not authorized by a valid and constitutional statute. If authorized by valid law, the officer's act is the state's act; if not so authorized, the officer's act is his own. See among many cases that might be cited, the noted *Virginia Coupon Cases*, 114 U. S. 207, 5 Sup. Ct. Rep. 903, et seq., and *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164. In this case the state has waived exemption from suit; but the question yet remains whether the officer's act was the state's act, and that question depends upon whether the officer's act was authorized by any valid statute. The complaint alleges no such statute, and there is none; and if such existed, a grave question as to its constitutionality would arise under article 10, section 7, which provides: "No scrip, certificate, or other evidence of state indebtedness shall be issued except for the redemption of stock, bonds or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this constitution."

The complaint alleges that there was a usage or practice for the superintendent of the penitentiary to so indorse notes taken for convict hire, and that such practice was known to and approved by the defendant. But such usage, if it existed, was unreasonable and in conflict with law, and could have no effect to authorize what could not be done without legislative authority. The statute giving Neal the right merely to receive money for convict hire constituted his specific instructions as a public agent, and the usage could not vary or enlarge the statutory authority: *Barksdale v. Brown*, 1 Nott & McC. 517, 9 Am. Dec. 720. This is a proper occasion to say that any such usage is unlawful and intolerable, in so far as it is thereby sought to pledge the credit of the state; for, as said in the *Bond Debt Cases*, 12 S. C. 200: "The credit of a state is a sacred thing; should not be prostituted ⁴⁷⁵ to every common purpose and hawked about on 'change like the note of a huckster." The complaint, in alleging the government's acquiescence in, and approval of, such conduct, states a mere conclusion of law which is not admitted by a demurrer. The state's acquiescence in, or approval of, such conduct could only be manifest by a valid act or joint resolution of the general assembly, and none such is alleged.

The doctrine of equitable estoppel has no application to a sovereign state. Equitable estoppel rests upon an implication of fraud in the party sought to be estopped, and fraud ought not to be imputed to the sovereign. The state can only act under its constitution and through its legislative enactments pursuant thereto, and can only ratify in the manner in which it could originally authorize; and if it could be estopped to assert the truth, the effect might be to fix upon the state responsibilities in conflict with its constitution and laws. All men are bound to take notice of the special authority of the state's officers, and when dealing with them outside their authority, they assume the peril with their eyes open, and cannot be heard to say that they placed reliance upon the state. The question is not one of intention, but of power; and if the officer has not power to act, his action is not state action, and so affords no basis upon which to predicate estoppel against the state. And if it were in any sense a question of intention, the state's intention can only be evidenced in a constitutional way. On the question whether equitable estoppel applies to a state respondent cites from a note to *Williamson v. James*, 4 Am. & Eng. Dec. in Eq. 367, to this effect: "The principles of estoppel also ex-

tended as far as they are applicable to a state: *State v. Taylor*, 28 La. Ann. 460; *State v. Ober*, 34 La. Ann. 359; *State v. Flint etc. R. R. Co.*, 89 Mich. 481, 51 N. W. 103; and to the United States: *United States v. Scott*, 38 Fed. 393." But further on, in the same note, it is stated that "nothing short of legislative act or resolution will estop a state from claiming the title to property: *Alexander v. State*, 56 Ga. 478." And further, that "the acts of state officers in assessing and collecting from a third person taxes on property owned by the state will not estop it, though the moneys so collected were applied to public uses: *State v. Jones*, 95 Ind. 175; *McCaslin v. State*, 99 Ind. 428; *State v. Portsmouth Sav. Bank*, 106 Ind. 435." On this point the attorney general cites Bishop on Contracts, section 310, where it is stated: "Ordinarily, and by most opinions, an estoppel does not take effect against the sovereign state or United States." Throop on Public Officers, page 552, where it is stated: "The government is never estopped on the ground that its agent is acting under apparent authority which is not real." To the same effect, the attorney general cites *State v. Bevers*, 86 N. C. 588, and *People v. Brown*, 67 Ill. 435, to which may be added the leading case in North Carolina: *Taylor v. Shufford*, 4 Hawkes, 16, 15 Am. Dec. 512; and in Illinois, the case of *Dement v. Rokker*, 126 Ill. 174, 19 N. E. 33. In the case of *Filor v. United States*, 9 Wall. 45, the supreme court of the United States held that the "unauthorized acts of officers cannot estop the government from insisting upon their invalidity, however beneficial they have proved to the United States": *Heyward v. Farmers' etc. Co.*, 42 S. C. 138, 46 Am. St. Rep. 702, 19 S. E. 963, 20 S. E. 64. See, also, the following cases: *State v. Brewer*, 64 Ala. 287; *Pulaski County v. State*, 42 Ark. 118; *Salem Imp. Co. v. McCourt*, 26 Or. 93, 41 Pac. 1105.

Nor do we think this action can be sustained, as contended by the respondent, as an action for money had and received. The state has only received that to which it was entitled, viz., money for the hire of convicts, received from the hands of the superintendent of the penitentiary. Plaintiff has paid no money to the state by mistake; for in the eye of the law plaintiff dealt with Neal, not with the state, and received from Neal all that it contracted for, the liability of the makers of the notes, supported by Neal's indorsement. In addition to this, as has already been shown, no equitable estoppel arises against the state as a basis for an implied contract, and the state cannot be made liable as

477 for an implied contract, when there was no power to make an express contract in the manner of this case.

The judgment of the circuit court is reversed and the case remanded, with instructions to sustain the demurrer and dismiss the complaint.

State.—The Doctrine of Estoppel does not apply to a state: *Wallace v. Maxwell*, 10 Ired. 110, 51 Am. Dec. 380; *Casey v. Inloes*, 1 Gill, 480, 39 Am. Dec. 658; *Taylor v. Shufford*, 4 Hawkes, 116, 15 Am. Dec. 512. A judgment against a state officer never estops the state on the principle of *res judicata*: *Peck v. State*, 137 N. Y. 872, 33 Am. St. Rep. 738, 33 N. E. 317.

State.—The force and effect of contracts entered into with a state are considered in *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624, 26 N. E. 778. Persons dealing with a public agent are presumed to know the limits of his authority: *Note to Baird v. Shipman*, 22 Am. St. Rep. 510. And whenever a public officer exceeds his authority, his acts are void: *Jones v. Gibson*, N. C. Term Rep. 41, 7 Am. Dec. 690.

STATE v. CITIZENS' TELEPHONE COMPANY.

[61 S. C. 83, 39 S. E. 257.]

TELEPHONE COMPANIES—MANDAMUS.—A telephone company is a quasi common carrier of news, and, as such, bound to supply all alike with similar facilities, under reasonable limitations and without any discrimination, who are in like circumstances. This duty may be compelled by mandamus. (p. 881.)

TELEPHONE COMPANIES—UNREASONABLE CONDITION.—A telephone company cannot, as a condition precedent to furnishing an applicant with telephone facilities, require him to stipulate that he will use the system of that company exclusively. (p. 881.)

MANDAMUS—INABILITY TO COMPLY WITH.—The fact that respondent cannot at once comply with a demand made in a writ of mandamus is sufficient to prevent an order requiring immediate compliance therewith. (p. 882.)

H. E. De Pass, for the appellant.

Simpson & Bemar, for the appellee.

84 **McIVER, C. J.** This was an application, addressed to the circuit court, for a writ of mandamus, requiring the respondent to place a telephone in the relator's grocery store and one in his residence, in the city of Spartanburg, and to connect them properly with its exchange and its subscribers, and to do all acts necessary to afford the relator the like service and tele-

phonic communication afforded to its other subscribers. The application was refused by the circuit judge, and the relator appealed to this court on the several grounds set out in the record, which it is not necessary to state here, as it will be sufficient to consider the several questions, as stated by counsel for respondent in his argument here, which are presented by this appeal.

As is said by the circuit judge in his decree, "there is practically no dispute as to the facts," which may be stated, substantially, as follows: The relator is now, and has been since the 28th of June, 1898, engaged in the mercantile business, carrying on a retail grocery store in the city of Spartanburg, and occupies a residence in said city; that the respondent, on sixteenth day of August, 1898, became a corporation under the laws of this state, for the purpose of owning, constructing, using, and maintaining electric telephone lines and exchange within the city of Spartanburg, and as such is now, and was at the time of the commencement of this proceeding, engaged in the said business, having established an ^{ss} exchange in said city, from which connections were made to telephone instruments in offices, places of business and residences of its subscribers; that the city council of Spartanburg has authorized the respondent to erect poles in the streets of the city for the purpose of transporting news over its wires to its subscribers, having a system of wires throughout the city, connected with telephone instruments furnished by it to its subscribers; that whenever a person desires a telephone, it is placed in the office, residence, or place of business of the applicant, at the expense of the respondent, with authority to the subscriber to use the same, upon certain rates and terms, for the purpose of telephonic communication with others; that some time in the year 1899 the respondent placed telephones in relator's residence and grocery store, giving proper connections with respondent's exchange and its subscribers or customers throughout the city of Spartanburg and elsewhere; that this was done under an agreement with the relator that he would use respondent's telephones exclusively, and not the telephone of the Bell Telephone Company, and that certain of respondent's subscribers in the said city of Spartanburg, including most of the grocerymen, were furnished with telephones by the respondent, under a similar agreement, but some of respondent's subscribers, including some merchants, physicians and others, and one groceryman, whose place of business was on the same street of said city as the grocery store of re-

lator, were supplied with telephones by respondent under agreements which contained no such stipulation as to the exclusive use of respondent's telephones, and they were using both telephones; that on or about the 6th of February, 1900, the respondent, learning that the relator had purchased Holland's market, in which there was a telephone placed there by the Southern Bell Telephone Company, a corporation duly chartered under the laws of this state, and that said market immediately adjoined relator's grocery store, and that relator had cut a door through the wall separating his grocery store from said market, thus opening a means of communication ⁸⁶ between the two structures, immediately removed, against the protest of the relator, the telephones which the respondent had previously placed in relator's grocery store and residence, for the avowed purpose of preventing the relator from using respondent's telephones while he was using the Bell Telephone—respondent claiming that under its agreement with relator he was bound to confine himself to the use of respondent's telephones; that on or about the 8th of February, 1900, the relator tendered to respondent the amount due for the past use of respondent's telephones, which was accepted, and that relator thereupon demanded that respondent place one of their telephones in his grocery store and one in his residence, with proper connections with respondent's exchange and its subscribers; but the respondent refused to comply with such demand unless the relator would agree to use respondent's telephones exclusively, and not use the telephone which had been placed in said market by the Bell Telephone Company.

The respondent, in its answer, alleges: "That its supply of telephone instruments is limited, and that it is with difficulty that this respondent can furnish such instruments to all applicants therefor. That even if the respondent was legally bound to furnish such instruments now, it would be impossible for it to do so within less than sixty days, for the reason of its inability to enlarge its switch-board." But as this allegation is not responsive to any allegation contained in relator's petition, and was not sustained by any evidence, so far as the "case" shows, it cannot now be considered. Besides, this court, having reached the conclusion, as will presently appear, that the relator is entitled to the mandamus, for which purpose the case will be remanded to the circuit court, with instructions to carry out the views herein announced, that court can, in its order directing the writ of mandamus to be issued, make such

provision, by giving a reasonable time within which the duty sought to be enforced shall be performed, provided the fact be as alleged in the foregoing quotation from respondent's answer.

⁸⁷ We will next proceed to consider the several questions of law growing out of the facts above stated and presented by this appeal. These questions are thus stated in the argument here on the part of the respondent, and we propose to adopt that statement: 1. Is the defendant telephone company, in any sense, a common carrier? 2. Can the defendant telephone company be required, in any case, against its will, to supply one of its instruments to petitioner? 3. Can the defendant telephone company be required by mandamus, under the circumstances of this case, to so furnish its instruments to petitioner?

The first, and, as it seems to us the controlling, question in the case is, we think, conclusively determined by the provisions of section 3 of article 9 of the present constitution, which reads as follows: "All railroad, express, canal and other corporations engaged in the transportation for hire, and all telegraph and other corporations engaged in the business of transmitting intelligence for hire, are common carriers in their respective lines of business, and are subject to liability and taxation as such," the balance of the section not being pertinent to the present inquiry. Now, if the respondent, "Citizens' Telephone Company," is a corporation, and is "engaged in the business of transmitting intelligence for hire," then it is expressly declared by the highest authority to be a common carrier. That it is a corporation is not and cannot be denied; and, as we think, it is equally undeniable that it is "engaged in the business of transmitting intelligence for hire." Indeed, that, so far as appears in this case, is the only business in which it is engaged. The distinction sought to be drawn by counsel for respondent in his argument here, between the mode of transmitting intelligence or a message, as it is usually called by telegraph and by telephone, is a distinction without a difference, so far as the question with which we are concerned is involved. While it is true that a person desiring to send a message by telegraph to another usually writes out his message and ⁸⁸ delivers it to the agent of the telegraph company (though we see no reason why it may not be delivered by word of mouth, or over a telephone, as no doubt is frequently the case), and the agent transmits such message, through the agency of instrumentalities provided by the telegraph company, to another agent of such

company at its destination, who writes it out, or delivers it by word of mouth or over a telephone, to the person for whom such message is intended, whereas a person desiring to send a message by telephone simply goes to the instrument provided for the purpose by the telephone company, calls up the agent of the company at the central office, and expresses his desire to be connected with the person to whom he wishes to speak, which being done by the agent of the company at the central office, the message is delivered directly to the person for whom it is intended, through the instrument and over the wires provided by the telephone company for the purpose. In both instances the intelligence or message is actually transmitted by the use of agencies and instrumentalities furnished either by the telegraph or the telephone company, for which they are entitled to receive proper compensation; and one is just as much engaged in the business of transmitting intelligence for hire as the other. Both are devices by which one person is enabled to communicate with another beyond the reach of the human voice, unaided by some artificial appliance; and although there are some differences in the mode of transmitting intelligence, yet the end sought and attained by each is substantially the same. Again, it is argued that there is another difference between the telegraph and the telephone which differentiates the former from the latter, and prevents legislative or constitutional provisions expressly applying to the former from being applied to the latter, and that is in the one case the purport of the message or intelligence to be transmitted must be known to the agent of the company, while in the other it need not be. In the first place, this difference does not always exist, as a matter of fact, for in many cases the purport of messages sent by telegraph ⁸⁹ are just as effectually concealed from the agent of the telegraph company as a message sent by telephone—in fact, more so—for in the case of a telegram in cipher, which is quite common, the purport of the message is entirely concealed, and is intended to be concealed from the knowledge of the telegraph operator and from everyone else, except a person holding the key to the cipher; while, on the other hand, messages sent by telephone are not, as matter of fact, always concealed from the knowledge of the agent of the telephone company, nor from third persons who may choose to listen. But even if such differences did exist, it is difficult to conceive how that would affect the substantial

identity of the business in which the two companies are engaged.

Again, it is argued that the framers of the constitution being, as they were, familiar with the use of the telephone, would, if they had intended to include telephone companies within the provisions of the section of the constitution above quoted, have mentioned such companies by name. This argument is based upon a misconception of the fundamental idea of the constitution, which is that such an instrument is the organic law, and deals with general principles, and does not and should not descend into details. But the conclusive answer to such argument is that the framers of the constitution certainly did not intend to limit its operation to telegraph companies, as, otherwise, the additional words, "and other corporations engaged in the business of transmitting intelligence for hire," would become wholly unmeaning and useless. These additional words were manifestly inserted for some purpose, and it is impossible to conceive of any other purpose except to include every other corporation, by whatever name it may be called, and by whatever means it conducts its business, which may be "engaged in the business of transmitting intelligence for hire"; and as we have shown that a telephone company is engaged in that business, telephone companies must be regarded as included within the terms of the constitutional provision.

The reference to section 3 (manifestly a misprint for section 4) ⁸⁰ of article 8 of the constitution, and to the act of 1898 (22 Stat. 779), and also act of 1898 (22 Stat. 780) to support respondent's contention, will next be considered. This constitutional provision simply forbids the general assembly from passing any law "granting the right to construct and operate a street or other railway, telegraph, telephone, or electric plant, or to erect water or gas works for public uses, or to lay mains for any purpose, without first obtaining the consent of the local authorities in control of the streets or public places proposed to be occupied for any such or like purposes." What possible bearing this provision can have upon the question we are considering, to wit, whether a telephone company can be regarded as, in any sense, a common carrier, it is impossible to conceive. Indeed, if it has any bearing at all, it would seem to be adverse to the contention of respondent; for it seems to recognize the idea that when a telephone company establishes its plant in a town or city, it devotes its property to public uses, and thus brings it under legislative control; nor do we see the relevancy

of the two acts above referred to. The former forbids telephone companies from making unreasonable discrimination in the rates at which they furnish telephonic service to its patrons; and this necessarily implies that its business is subject to legislative control. The other act simply invests the railroad commission with power to regulate the charges of express companies for transportation and the charges of telegraph companies for the transmission of messages. But until it is shown, as it has not and cannot be shown, that the power to regulate charges by law is a feature essential to the business of a common carrier, the provisions of this act do not even tend to show that a telephone company is not a common carrier. Indeed, as matter of fact, the rates of charges by all classes of common carriers, for example, steamboat companies, are not regulated by law.

But even if there were no constitutional provision and no legislation upon the subject, we are of opinion that this question is settled by the principles of the common law, which, being elastic in their nature, may be applied to subjects and conditions which have but recently become known and used in the business of the country. In this state, we have no case, so far as we are informed, upon the question whether a telephone company is, in any sense, a common carrier; and we have only two cases relating to the somewhat analogous question as to whether a telegraph company is a common carrier, viz. *Aiken v. Telegraph Co.*, 5 S. C. 358, and *Pinckney v. Western Union Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765; but neither of these cases decides that a telegraph company is, in no sense, a common carrier, though the contrary seems to be supposed (erroneously, as we think) by some. Both of these actions were brought to recover damages for errors in the transmission of messages sent over the lines of the telegraph company occasioned by the alleged negligence of the defendant companies. In neither of these cases was the question made or decided as to whether a telegraph company was a common carrier. On the contrary, in the *Aiken* case, Willard, J., in delivering the opinion of the court, uses language implying that a telegraph company is a common carrier, for on page 370 he says: "It is a contract with one exercising a public employment under express statute powers created for that purpose. The nature of the occupation of that class of persons and the tender of their services to the community make them common agents for the transmission of messages for all persons who may desire and

pay for such services to any person, either as the final receiver of such message or as a means or agent for its further transmission. The object of the contract is to modify and limit the contract which, by operation of law, would arise between the common carrier of messages and any person employing such carrier, in the absence of any stipulation of terms between them. The foundation of the contract is the nature of the carrier's occupation and the fact of employment. The legal consequences flowing from such employment are what the special contract seeks to modify or limit." It is true that on the next page the learned justice ⁹² does say: "The regulation of the defendants in conformity with which the terms of the contract limiting their liability was made was a reasonable regulation, and such as the defendants were authorized to make. In examining the proposition just stated, it must be borne in mind that the analogy between common carriers of goods and common carriers of messages is not perfect. The nature of the services performed differs materially in the two cases, and the real responsibility differs in a corresponding manner." That case, therefore, as we understand it, simply decides that where a telegraph company agrees to send a night message, which it is not bound to send, under certain stipulations as to its liability in case of errors in the transmission of such message, such stipulations are reasonable and may be enforced, but the case throughout recognizes the doctrine that a telegraph company is a common carrier, though the analogy between common carriers of goods and common carriers of messages is not perfect, owing to the fact that the nature of the services rendered differs materially in the two cases, and hence the measure of responsibility for any default in rendering the services must likewise differ. So in the Pinckney case, supra, the court, while not undertaking to decide whether a telegraph company could in any sense be regarded as a common carrier, as no such question was presented in that case, simply decided that a telegraph company was not held to the stringent rule of the common law whereby common carriers of goods were held liable for all such losses and damages as they could not show resulted from the act of God or the public enemy, but were only liable for all such losses and damages as they could not show were not due to the fraud or negligence of their agents or servants; and the reason for such a limitation of the rule was found in the peculiar nature of the business in which a telegraph company is engaged, differing in material respects from that of common car-

riers of goods. While it is true that the late Chief Justice Simpson, in delivering the opinion of the court, does use some expressions which may possibly seem to indicate that ⁸³ he thought a telegraph company was not a common carrier, yet that was not a question in the case, and, therefore, such expressions, even if amounting to what is claimed for them, are not authoritative. For, as the learned chief justice himself says on page 82, there is but a single question in the case, and he thus states that question: "The question to be considered, therefore, is whether telegraph companies are liable for all mistakes made in the transmission of messages except such as occur from any act of God or irresistible force, the onus of showing which is upon them."

In other jurisdictions, however, the question has been made and distinctly decided. Amongst the various cases which we have consulted we cite first the case of *State v. Nebraska Teleph. Co.*, 17 Neb. 126, reported also in 52 Am. Rep. 404, 22 N. W. 237. In that case the facts were in substance very similar to the facts in the case which we are now called upon to decide, and it was there held that a telephone company cannot arbitrarily or capriciously refuse its facilities to any person desiring them and offering compliance with its reasonable regulations, and that mandamus will issue to compel the company to do its duty. The facts of that case were substantially as follows: The relator made an arrangement with the defendant company to place an instrument in his office, but for some reason failed to furnish the relator with a directory or list of its subscribers, with their numbers, which relator claimed was essential to the profitable use of the telephone, and which it was the custom of the company to furnish to its subscribers. After a time such list was furnished to the relator by the company, but when called upon by the company to pay for the use of the telephone in his office, the relator refused to pay for the use of the telephone during the time the company was in default in furnishing the directory or list of subscribers. Thereupon the defendant company removed the telephone from the office of the relator. Subsequently, the relator applied to the company to become a subscriber and to have an instrument placed in his office, which the company refused to do; whereupon ⁸⁴ the relator applied for a writ of mandamus to compel the company to comply with his demand. In that case the court proceeded upon the fundamental doctrine that when a person or company, especially one who is exercising

its franchises under its charter, devotes its property to a public use by undertaking to supply a demand which "is affected with a public interest," it must supply all alike who are alike situated, and cannot discriminate in favor of or against any one. In the course of the opinion, the court uses the following language: "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great part of the civilized world, cannot be questioned. It is, to all intents and purposes, a part of the telegraphic system of the country, and in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier."

So in *Chesapeake etc. Teleph. Co. v. Baltimore etc. Tel. Co.*, 66 Md. 399, reported also in 59 Am. Rep. 167, 7 Atl. 809, Alvey, C. J., in delivering the opinion of the court, uses this language: "The appellant [the telephone company] is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. . . . The telegraph and telephone are important instruments of commerce, and their services as such have become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own and control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railroad company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and while offering [themselves as] ready to serve some, refuse to serve others. The law requires them to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations."

Again, in *State ex rel. Baltimore etc. Tel. Co. v. Bell Teleph. Co.*, 23 Fed. 539, decided in 1885, Judge Brewer, now one of the associate justices of the supreme court of the United States, after laying down the general principle that a corporation deriving its franchises from its charter, which devotes its property to public uses, puts its property into the channel

of commerce, and thereby becomes subject to the control of the law regulating such commerce, uses this language: "A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all." That case seems to have been carried by writ of error to the supreme court of the United States, but was never considered by that court, for in 127 U. S. 780, we find this simple statement: "Dismissed with costs on the authority of the plaintiff in error," April 18, 1888. In 25 American and English Encyclopedia of Law, at page 750, we find the following: "Telephone companies, like telegraph companies, are to some extent common carriers, and are bound to afford equal facilities to all. They can be compelled by mandamus to furnish facilities to one offering to comply with their regulations, even though such a party is a rival company." To same effect, see page 775 of same volume, and on page 776 it is said: "In many of the states statutes exist which provide for the enforcement of these obligations; but it seems that the rule would be the same whether the obligation was declared by statute or considered as arising from the common law." For, as was said in *State v. Nebraska Teleph. Co.*, 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237, in commenting on *State v. Bell Teleph. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583, where ⁹⁶ there was a statute upon the subject: "So far as the obligations of the telegraph companies are defined by the act (except the payment of the penalty), they are simply declarative of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of the statute, and the same is true of the clause of the act making its provisions applicable to telephones." Again, it is said in the same case: "Similar questions have arisen in and have been frequently discussed and decided by the courts, and no statute has been deemed necessary to aid the courts in holding that where a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike who are alike situated, and not discriminate in favor of nor against any." It is true that in the more recent edition of the encyclopedia above referred to the rule is stated in a more modified form. See 6 Encyclopedia of Law, second edition, at page 261, where the following language is used: "It was at one time attempted to class telegraph companies as common carriers, but the view

universally adopted now is that they can in no sense be regarded as common carriers; *they are like common carriers in that they are bound to serve impartially all those applying to them*, but they are liable for improper transmission of messages only upon proof of negligence." So that it is apparent from the language which we have italicized in the foregoing quotation that the rule, even when stated in its modified form, supports the contention of the relator, assuming, as we are authorized to do by the authorities, that the rule applicable to telegraph companies is also applicable to telephone companies—at least, so far as the obligation to serve all alike who apply for the use of the facilities which it offers to the public for the transmission of news is concerned.

We are satisfied, therefore, that while a telephone company may not be, in every sense of the terms, a common carrier of goods, and as such subject to the same stringent rules which govern in ascertaining the liability of such carriers, yet, in one sense at least, it is a common carrier of news, and ^{or} as such bound to supply all alike, who are in like circumstances, with similar facilities, under reasonable limitations, for the transmission of news, without any discrimination whatsoever in favor of or against anyone; and this is so under the well-settled principles of the common law, without the aid of any constitutional or statutory provision imposing such an obligation. The answer to the second question, under what has already been said, must necessarily be in the affirmative.

To dispose of the third question, it will be necessary to recur somewhat to "the circumstances of this case." The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become, at least, a quasi common carrier of news, and as such was under an obligation to serve all alike who applied to it within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal—that the relator refused to agree that he would use respondent's telephone sys-

tem exclusively—was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever; and especially is this so when it was admitted that the respondent was, at the time, affording to one person, at least, who was engaged in the same business as that of the relator, whose place of business was on the same street of the same city, the same facilities which the relator demanded, without requiring any such stipulation as that required of the relator, but who was, in fact, using both telephone systems. It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell Telephone system in operation in the same city, but use exclusively respondent's system, than a railway company would have to refuse to transport the goods of a shipper, unless such shipper would agree to patronize its line exclusively and not give any of its business to any competing railway line. Nor does the fact (if fact it be) that the relator had committed a breach of its previous contract with respondent, when he purchased Holland's market, in which an instrument of the Bell Telephone Company had been placed, and had thereby acquired the right to use the Bell Telephone, afford any reason why the respondent should decline to comply with relator's demand to furnish his grocery store and residence with its telephone instruments. If the relator had committed any breach of its previous contract with the respondent of which the latter had any legal right to complain, its remedy, as was said in one of the cases which we have consulted, was by an action to recover damages for such breach of contract, but not by refusing to perform its obligation to the public, of which the relator was one. As to the other reason suggested why the mandamus prayed for should not issue under the circumstances of this case, to wit, that respondent did not have the means to comply with the demand of the relator within less than sixty days, it is only necessary to repeat what we have said above—that there does not appear to be any evidence in the "case" to sustain the fact upon which this suggestion is based, and, therefore, it cannot now be considered. Besides, as is said above, that is a matter which may be considered when the case goes back to the circuit court, which can, in ordering the mandamus to issue, as herein directed, make suitable provision for allow-

ing respondent reasonable time, if such shall be shown to be necessary, to comply with relator's demand.

As to the position taken in the argument—that ⁸⁸ mandamus is not the proper remedy—we think it entirely clear, both upon principle and authority, that mandamus is the appropriate remedy in a case of this kind.

The judgment of this court is, that the judgment of the circuit court be reversed and that the case be remanded to that court, with instructions to carry out the views herein announced.

Mandamus to Private Corporations to compel the performance of their duties is considered in the monographic note to *Potwin Place v. Topeka Ry. Co.*, 37 Am. St. Rep. 317-323. Telephone companies may be compelled, by mandamus, to furnish any person or company the like service it furnishes to others: *Central Union Tel. Co. v. Falley*, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 604; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237.

SUDDUTH v. SUMERAL.

[61 S. C. 276, 39 S. E. 534.]

DEEDS—CONSTRUCTION.—It is the province of the court, and not of the jury, to construe the terms of a deed offered in evidence. (p. 885.)

APPELLATE PRACTICE—INSTRUCTIONS.—Error cannot be predicated upon the failure of the trial court to charge the jury upon particular propositions, when no request to charge thereon was made. (p. 886.)

COTENANCY—ADVERSE POSSESSION.—If a stranger goes into possession of land under a recorded deed from a cotenant purporting to convey an absolute and exclusive title to the entire interest in the land, this constitutes an ouster of the other cotenants not laboring under any disability, and the grantee's possession may be adverse as to them from the time of its commencement. (p. 887.)

A. C. Welborn and Ansel, Cothran & Cothran, for the appellants.

Haynesworth, Parker & Patterson, for the appellee.

²⁸⁴ McIVER, C. J. The plaintiffs brought this action for the partition of a tract of land, alleging that they ²⁸⁵ were entitled to four undivided ninths of the land, and that the defendant was entitled to the remaining five-ninths. The de-

fendant by her answer set up several defenses: 1. A general denial of all the allegations in the complaint; 2 and 3. A denial that plaintiffs, or either of them, have any title to, or interest in, the land described in the complaint; and, on the contrary, alleges that she is the sole owner of said lands, having derived title thereto under a deed executed the 22d of November, 1879, purporting to convey the same to her in fee simple, under which she has ever since said date been in the open, notorious, adverse, and exclusive possession of the said land, claiming the same as her own, and claiming that plaintiffs' action is thereby barred under the provisions of the statute of limitations.

The following are the undisputed facts as developed by the testimony in the case: The land originally belonged to one Roger Loveland, who died on the 30th of January, 1857, intestate, leaving as his heirs at law his widow, Martha Loveland, and his children, Isaac Newton Loveland (who died on the 12th of February, 1859, childless and unmarried), and his daughter, Isabella J., who intermarried with P. F. Sudduth on the 16th of June, 1858, and died on the 14th of June, 1873, leaving as her heirs at law the said P. F. Sudduth her husband, and her two children, S. Davis Sudduth and Mary C. Cunningham, two of the plaintiffs in this case, and also another daughter, Drusilla A., who intermarried with one Thomas H. Stall on the 1st of June, 1858, and died on the 1st of July, 1864, leaving as her heirs at law her said husband and her daughter, Cora B. (now the wife of one Terry), who is the other plaintiff in the case. On the 9th of February, 1864, Martha Loveland, P. F. Sudduth, Isabella J. Sudduth, Thomas H. Stall, and Drusilla A. Stall, executed a deed conveying the land in question to one J. A. David, who went into possession of said land under said deed, claiming it as his own, and remained in such possession until the 3d of November, 1879, when he conveyed the same to William Sumeral, who went into possession, claiming ²⁹⁶ it as his own, and retained such possession until the 22d of November, 1879, when he conveyed said land to his wife, Louisa Sumeral, the defendant herein, who went into possession claiming it as her own, and has ever since retained such possession. All these deeds were recorded in the proper office in the county of Greenville, where the land lies. In the "case" we find the following statement in regard to these deeds: "The deeds introduced in evidence contained general warranties, and purported to convey the entire interest in the

land, therein described." It appears, however, that though Mrs. Sudduth and Mrs. Stall joined in the deed of 9th of February, 1864, to J. A. David, they did not renounce their inheritance in the manner prescribed by the act of 1795, then in force; and hence the plaintiffs claim that upon the death of Mrs. Sudduth and Mrs. Stall, respectively, their heirs at law became entitled to their shares of the land, respectively, though they admit that the surviving husbands of each of these married ladies are estopped, by their deed of 9th of February, 1864, from making any claim as one of the heirs at law of their respective wives; and hence they only claim the shares of the plaintiffs herein, to wit, four-ninths of the land. Inasmuch as the plaintiffs claim that they are protected from the plea of the statute of limitations by the disability arising from infancy, it will be necessary to state the ages of the parties. It appears from the testimony in the case that the plaintiff, S. Davis Sudduth, was born on the first day of March, 1866, and hence he did not attain his majority until the day before the first day of March, 1887; that Mrs. Cunningham was born on the 18th of March, 1859, and hence did not attain her majority until the 17th of March, 1880; and that the other plaintiff, Mrs. Terry, was born on the 16th of September, 1859, and hence did not attain her majority until the 15th of September, 1880. Now, as this action was commenced on the 20th of February, 1900, it follows that S. David Sudduth had been of age very nearly thirteen years, Mrs. Cunningham very nearly twenty years, ²⁸⁷ and Mrs. Terry nearly twenty years, when this action was commenced.

After hearing the evidence and the charge of the judge, the jury rendered a verdict in favor of the defendant, and from the judgment entered thereon the plaintiffs have taken an appeal to this court, basing their appeal upon the several exceptions set out in the record. For a full understanding of the questions presented, the charge of the circuit judge, together with the exceptions thereto, will be reported.

The first exception imputes error in charging on the facts, because the judge charged on the facts in saying to the jury that the deeds therein referred to "purport to convey the entire estate in the lands described in the complaint." The point of this exception lies in the fact that the judge, in so charging, assumed as a fact that the land described in those deeds was the same as that "described in the complaint." But when it is seen that the judge expressly qualified those re-

quests, referred to in the exception, by adding the words: "If the deeds convey the land described in the complaint," it is manifest that the exception is without foundation. The only possible question of fact which could arise out of the requests was whether the land described in the deeds was the same as that described in the complaint; and that question the judge expressly left to the jury by his qualification of the requests. Whether those deeds purported to convey the entire or any lesser estate in the land described in the deeds was a question of law and not a question of fact, for it is settled law that it is the province of the judge, and not of the jury, to construe the terms of a deed when offered in evidence. The first exception must, therefore, be overruled.

The second exception is taken under a misconception of the judge's charge, for we do not understand him as instructing the jury, "that the statute of limitations governs this case"; though he did charge the jury (and as we think correctly) that if the defendant held the land in dispute adversely for ten years, after all the plaintiffs became of age, ²⁸⁸ she would be entitled to a verdict, but he left it to the jury to say whether the defendant did hold the land adversely for the time stated; and in this there was no error. The second exception must be overruled.

The third exception imputes error to the circuit judge in not charging the jury that the statute of limitations did not run in favor of one tenant in common against another unless there has been an ouster. In the first place, it does not appear that any request was made to charge any such proposition. All that we find in the "case" as to that matter is this: "Mr. Ansel [one of the counsel for plaintiff] requests the court to charge the jury as to ouster," and the judge did proceed to instruct the jury as to ouster, in terms to which no exception appears to have been taken. There was no request to charge any particular proposition as to the law of ouster. It was simply a general request "to charge the jury as to ouster," and that request was complied with. The third exception must, therefore, be overruled.

The fourth and fifth exceptions are open to the same objection, as there were no requests to charge either of the propositions which appellants claim by these exceptions ought to have been charged, and this would be sufficient to dispose of both of these exceptions. But as the appellant in the fifth exception complains of error in charging the defendant's fourth request,

which is set out in that exception, we will not decline to consider that exception. Without repeating that request, in terms, it is sufficient to say that it amounted to this: If the jury should conclude that the defendants went into possession under the deed from W. L. Sumeral on the 22d of November, 1879, and held it adversely to the plaintiffs until the commencement of this action on the 20th of February, 1900, then such possession would constitute a valid defense to this action; unless during this period some one or more of the plaintiffs were infants; and if so, then the period of such infancy must be deducted from the period of adverse possession; and if there then ²⁸⁹ (after such deduction) remained ten years, during which the defendant held this land adversely to the plaintiffs and exclusive of their interest, this would be a good defense to this action. In this there was no error of law, for when the judge instructed the jury that to make this possession on the part of the defendant a good defense to the action it must have been taken under the deed of 22d of November, 1879, which upon its face purported to convey to her an absolute and exclusive title to the land, and when he emphasized this by saying that such possession must be adverse to the plaintiffs, and reinforced such emphasis by saying that such possession must not only be adverse to the plaintiffs, but also exclusive of their interest, he absolutely negatived the idea that such possession, if taken and held as a tenant in common with plaintiffs, would be a good defense to the action, as appellants seem disposed to construe the charge. It is quite true that if a person goes into possession of a tract of land as a tenant in common with another, no length of such possession can give him a title by the statute of limitations against his cotenant, for the very obvious reason that his possession cannot be adverse to his cotenant until an ouster is established. But where, as in this case, a person goes into possession of land, under a deed from a third person which purports on its face to convey to him an absolute and exclusive title to the entire interest in the land, and such deed is spread upon the public records, this is notice to the world that he is claiming the entire and exclusive interest in the land, and his possession may be adverse to all the world from the time of its commencement. Of course, such adverse possession cannot avail him against one laboring under any legal disability, such, for example, as infancy, until his possession continues for the prescribed time after the removal of such disability. This view is sus-

tained by the case of *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3. In that case the plaintiffs brought the action to recover possession of lands in the possession of the defendant, claiming that they, as heirs at law of one Thomas Garrett, were tenants in common of said ²⁹⁰ land, with E. W. Moise and those claiming under him, he having acquired the interest of one of the heirs at law (Mrs. Moore) of Thomas Garrett, who was the widow of said Thomas Garrett and had contracted a second marriage with one John S. Moore. It appeared that John S. Moore and his wife had joined in a deed for the lands in dispute to E. W. Moise, executed on the 13th of April, 1871, under which deed the defendants claimed. In delivering the opinion of the court, Mr. Justice Gary, in speaking of this deed, used the following language, which is quite appropriate to the present case: "If the deed which was recorded should be construed as a conveyance of all the land, and Edwin W. Moise entered into possession thereunder, without recognizing any other claim, then such entry would constitute ouster." Counsel for appellants, in the argument here, suggest that the learned justice "could not have meant it was actual ouster, but presumption of ouster, which could only operate against an infant after the expiration of twenty years, deducting the period of minority." The reason given by counsel for such a suggestion is that Mr. Justice Gary, in a subsequent portion of his opinion, held that though Marion Moise, the grantee of E. W. Moise, held possession of the land for more than ten years after John Norton, one of the plaintiffs, had attained the age of twenty-one years, yet he held that John Norton was not barred, because, as counsel says: "The opinion as a whole shows that it would have taken twenty years after John Norton reached his majority to have perfected a presumption of ouster against him." This view of counsel for appellant is based upon an entire misconception of the opinion of Mr. Justice Gary, in which not a word can be found justifying the inference that he held that John Norton was not barred because the period of twenty years had not elapsed after John Norton had attained the age of twenty-one years; and, on the contrary, the opinion clearly shows that John Norton, as well as some of the other plaintiffs, was not barred by the statute of limitations, for a much better reason, to wit, the minority of some ²⁹¹ of the other cotenants, plaintiffs in the case. There is no warrant, therefore, for the suggestion of counsel that Mr. Justice Gary could not have meant what he said, for it was un-

questionable good law, and is sustained by the cases of *Sumner v. Murphy*, 2 Hill, 488, 27 Am. Dec. 397; *Gray v. Bates*, 3 Strob. 502, where O'Neill, J., in delivering the opinion of the court, uses this language: "That Bordeaux was tenant in common with Smith and Muckelrath of the large grant, of which the land in dispute was part, is true; that each tenant in common had the right to the possession of the whole or part of the land is also true. But it by no means follows that a purchaser from one of the cotenants [Bordeaux] of a part of the tract, without reference to the title of the other cotenants, would necessarily become tenant in common, so as to prevent him from perfecting his title by adverse possession under our act of limitations. To constitute an adverse possession it is only necessary it should be held as 'one's own'": See, also, *Odom v. Weathersbee*, 26 S. C. 247, 1 S. E. 892, where Mr. Justice McGowan, in delivering the opinion of the court, uses this language: "It is true that the children and their mother were tenants in common, and that one tenant in common cannot, at law, sue his cotenant unless there has been an actual ouster. But when one tenant in common conveys to a stranger who sets up title to the whole and denies that the other tenant has any interest, there is ouster, and the stranger may be sued in an action at law." From this it follows that exceptions 4 and 5 must likewise be overruled.

The judgment of this court is, that the judgment of the circuit court be affirmed.

Cotenancy—Adverse Possession.—If one cotenant attempts to convey the whole estate in fee, and his grantee records his deed, and enters upon the estate and claims and holds exclusive possession, the entry and claim are adverse to the title and possession of the other cotenant and amount to a disseisin: *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702; *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663; *King v. Carmichael*, 136 Ind. 20, 43 Am. St. Rep. 303, 35 N. E. 509.

Failure to Instruct the Jury on propositions not requested by counsel is not error: *Feary v. O'Neill*, 149 Mo. 467, 73 Am. St. Rep. 440, 50 S. W. 918; *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939.

The Construction of a Deed is for the court: See the monographic note to *Fagin v. Connolly*, 69 Am. Dec. 454.

**ABBEVILLE ELECTRIC LIGHT AND POWER COMPANY
v. WESTERN ELECTRICAL SUPPLY COMPANY.**

[61 S. C. 361, 39 S. E. 559.]

CORPORATIONS, FOREIGN—JURISDICTION OF—SERVICE ON AGENT.—Jurisdiction of a foreign corporation, not having a resident agent, is acquired by personal service within the state of a complaint and summons alleging a cause of action arising in such state, upon an agent of such corporation engaged in transacting business for it within the state. (p. 894.)

CORPORATIONS, FOREIGN—SERVICE ON AGENT CASUALLY IN STATE—JURISDICTION.—A state court cannot, in an action in personam, acquire jurisdiction of a foreign corporation simply by personal service of summons upon its officer or agent while he is casually within the state, and not there for the purpose of attending to any business of the corporation. (p. 896.)

W. N. Graydon, for the appellant.

F. B. Gary, for the appellee.

⁸⁹⁶ McIVER, C. J. The action in this case was commenced by the service of summons, with a copy of the complaint attached thereto, upon one George F. Schminke, at Abbeville courthouse, on the seventh day of November, 1900, by the sheriff of Abbeville county under the claim that the said Schminke was an agent of the defendant company, a corporation duly chartered under the laws of the state of Missouri. In the complaint it is alleged that "the cause of action set forth herein arose in this state," and the other allegation set forth as the cause of action is the ⁸⁹⁷ breach of a contract whereby the defendant company guaranteed that a certain electric machine for the purpose of generating electricity, known as a "45 K. W. Warren Alternater," sold by defendant to plaintiff in December, 1899, was free from any and all inherent electrical or mechanical defects. Before the time for answering expired, to wit, on the 26th of November, 1899, the defendant, by his attorney, gave notice of a motion to set aside the service of the summons, "on the ground that the party served with the summons and complaint herein, on the seventh day of November, 1900, was not an agent of the defendant," expressly stating in this notice that "defendant will appear for the purpose of objecting to the jurisdiction of this court, and for no other purpose."

This motion was heard by his honor, Judge Benet, upon the affidavits and letters and card thereto attached, which are set

out in the "case," who, in a short order, granted the motion to set aside the service of the summons, and dismissing the case for want of jurisdiction. The only reason given by the judge is thus expressed in his order: "After argument of counsel on both sides, I hold that defendant, nonresident corporation, could not be brought within the jurisdiction of this court by service of the summons upon the said George F. Schminke, he not being, in my opinion, an agent in the sense in which 'any agent' is used in the code." The provision of the code here referred to may be found in the second paragraph of section 155, where, after prescribing the manner in which a corporation shall be served with a summons, originally proceeded as follows: "Such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made in this state personally upon the president, cashier, treasurer, attorney, or secretary, or any resident agent thereof." But by the act approved 2d of March, 1899 (23 Stats. 42), that provision of the code was amended by striking out the word ~~res~~ "resident" in the last line of the above quotation; so that, as the law now reads, and as it read at the time this action was commenced, a foreign corporation could be made a party to an action by serving personally any agent of such foreign corporation within the limits of this state. If, therefore, we look alone to the express language used in the code, especially bearing in mind the fact that the legislature had, in express terms, seen fit to strike out, by the act of 1899, *supra*, the word "resident"—the only word qualifying the word "agent," leaving the broad terms "any agent," without any qualification whatsoever—it is clear that the circuit judge erred in holding, practically, that the word "agent" must be qualified in some way, though he does not specify in what way. In addition to this, it will be observed that the notice of the motion expressly states that it was based "on the ground that the party served with the summons and complaint herein on the seventh day of November, 1900, was not an agent of the defendant," and that ground was not only not sustained by any evidence offered in the "case," but, on the contrary, was in terms negatived by the defendant's own showing; for in the affidavit of Scudder, the general manager of the defendant, he only says that Schminke "at the time of said service, was not an officer of this defendant, nor a director thereof"; but he does not say that he was not an agent of defendant company; but he does say, not expressly,

it is true, but by necessary implication, that he was an agent; for he says: "That he was simply and solely the traveling salesman for this defendant"—going on to state to what extent his powers and duties were limited; and this necessarily implies that he was an agent of the defendant. Nor was there any finding of fact by the circuit judge that Schminke was not the agent of the defendant. On the contrary, the language used by him necessarily implies that while he thought that Schminke was, in one sense, the agent of the defendant company, yet, in his opinion, he was not an agent "in the sense in which 'any agent' is used in the code." It is clear, therefore, that if the only ground upon ~~300~~ which the motion was based was not sustained, there was error in granting the motion.

It is earnestly and with force contended by the counsel for the respondent that the provisions of the code above referred to should not be literally construed, and that, on the contrary, with a view to avoid a conflict with well-settled principles established by the decisions of the supreme court of the United States—the tribunal invested with authority to determine finally controversies between citizens of different states of the union—the provisions of our code should be given a liberal construction, as was done in the case of *Tillinghast v. Boston etc. Lumber Co.*, and *Moore v. S. C. Forsaith Machine Co.*, 39 S. C. 484, 18 S. E. 120; but as the action was dismissed as to the Boston and Port Royal Lumber Company upon the ground that the complaint did not state facts sufficient to constitute a cause of action against that company, from which there was no appeal, the case was considered as an action against the S. C. Forsaith Machine Company alone: See 39 S. C. 488, 18 S. E. 122. One of the questions—in fact, the only real question—in the case, was whether the state court had acquired jurisdiction of the said machine company, a foreign corporation, chartered by the laws of the state of New Hampshire, by the service of the summons upon that company at their place of business in the city of Manchester, in the state of New Hampshire, after an order of publication had been obtained—the said company having no property within the limits of this state, and no place of business, and no agent in this state. This court held that while it was true that the terms of our code did seem to justify a service upon a foreign corporation outside of the limits of this state after an order of publication had been obtained even in an action in personam, yet in view of the fact that the supreme court of the United States had taken a different view, in the

case of *Pennoyer v. Neff*, 95 U. S. 714, and other cases following that case, which were cited in *Tillinghast v. Boston Company*, it would be necessary to give to our code such a construction as would avoid a conflict ³⁷⁰ with these decisions of the supreme court of the United States, and accordingly those provisions of our code there considered were so construed as applying only to proceeding in rem, and not to actions in personam. It will be observed that the court, in *Tillinghast v. Boston Company*, was called upon to construe a different section of the code, containing different language from that which it is now called upon to consider. In the former case, the question was as to the construction of the following language in section 156 of the code, in which the manifest purpose was to provide for service by publication, to wit, that certain officers "may grant an order that the service be made by publication of the summons in either of the following cases: 1. Where the defendant is a foreign corporation, has property within the state, or the cause of action arose therein," and after mentioning other cases in which service by publication may be made, and after prescribing how such publication is to be made, and that in such cases the officer making the order shall require a copy of the summons to be forthwith deposited in the postoffice, directed to the person to be served at his place of residence, etc., the following language is used: "Where publication is ordered, personal service of the summons, *out of the state*, is equivalent to publication and deposit in the postoffice" (*italics ours*). But in this case the court is called upon to construe—not section 156 of the code, nor any language contained therein—but section 155, as amended by the act of 1899, *supra*, which, after prescribing in the first paragraph of the first subdivision of the section how a corporation may be served with the summons, in the second paragraph of that subdivision uses the following language: "Such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made, in this state, personally upon the president, cashier, treasurer, attorney, or secretary, or any agent thereof." So that in the former case the question was as to the validity of the service of the summons upon a foreign ³⁷¹ corporation outside of the limits of this state, while here the question is as to the validity of the service made within the limits of this state, and the difference is obvious and very important. We do not think, therefore, that the case of *Tillinghast v. Boston etc. Company*, 38 S. C. 484,

18 S. E. 120, or any of the decisions following that case, have any application to the question presented in this case.

It was also contended by counsel for respondent that the defendant company not having complied with the provisions of section 1466 of the Revised Statutes of 1893, has not waived its exemption from suit in the courts of this state, or consented to be subjected to the jurisdiction of our courts. In the first place, it must be remembered that the provisions of that section, as well as other sections contained in the same chapter of the Revised Statutes, have been amended by the act of 1897 (22 Stats. 484), and various other conditions have been added, one of which is, "that it shall be taken and deemed to be the fact, irrebuttable, and part and parcel of all contracts entered into between such corporation [foreign] and a citizen or corporation of this state, that the taking or receiving from any citizen or corporation of this state of any charge, fee, payment, toll, impost, premium, or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place of the making and of the performance of such contract shall be deemed and held to be within this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding." Now, if the defendant company has received any payment or other moneyed or valuable consideration under or in performance of the contract, admittedly made between the parties, as may be reasonably and, as we think, must be inferred, then, under the statutory provision just quoted, it must be regarded as an irrebuttable fact that the defendant company was doing business within this state, and the place of the making and of performance of such contract shall be deemed ³⁷² and held to be within this state, notwithstanding anything to the contrary in the contract, or the rules and by-laws of the foreign corporation. Under this view the case must be regarded as a case in which a domestic corporation, having, as it supposed, a claim against a foreign corporation, doing business in this state, arising out of a contract made and to be performed in this state, has undertaken to commence its action against such foreign corporation by serving, personally, within the limits of this state, an agent of such foreign corporation, with a copy of the summons; and in such a case we do not think that any authority has been or can be cited, which

holds that the state court had not thereby acquired jurisdiction of the foreign corporation.

But assuming that we are in error in regarding this case as such a case as that just mentioned, and, on the contrary, that it is a case in which the plaintiff, a domestic corporation, has brought an action, under a contract which was not made in this state and was not to be performed here, against the defendant, a foreign corporation, and has undertaken to obtain jurisdiction of such foreign corporation, by the personal service of its agent within the limits of this state, we will proceed to inquire whether, under the admitted facts in this case, such service would be recognized as good and valid, under the decisions of the supreme court of the United States, as we freely recognize the superior authority of such decisions in controversies between citizens of different states.

The first case cited by respondent's counsel is the case of *Lafayette Ins. Co. v. French*, 18 How. 404. That was a case in which the question was as to the validity of a judgment recovered against the plaintiff in error, a foreign corporation, in a state court of Ohio, in an action commenced by service of process upon an agent of said plaintiff in error, within the limits of the state of Ohio; and the question turned upon the inquiry whether the state court of Ohio had, by such service, obtained jurisdiction of the said insurance company, the objection to such service being that a ³⁷³ state court could not obtain jurisdiction of a foreign corporation created by the laws of another state. As is stated by Mr. Justice Curtis, in delivering the opinion of the court: "The precise facts upon which this objection depends are that this corporation was created by a law of the state of Indiana, and had its principal office for business within that state. It had also an agent authorized to contract for insurance, who resided in the state of Ohio. The contract on which the judgment in question was recovered was made in Ohio, and was to be there performed, because it was a contract with the citizens of Ohio to insure property within that state. A statute of Ohio makes special provision for suits against foreign corporations, founded on contracts of insurance there made by them with citizens of that state; and one of its provisions is, that service of process on such resident agent of the foreign corporation shall be as 'effectual as though the same were served on the principal.'" In discussing the law applicable to this state of facts, the learned justice uses the following language: "The inquiry is not whether the defendant was, personally,

within the state, but whether he, or some one authorized to act for him in reference to the suit, had notice and appeared, or if he did not appear, whether he was bound to appear or suffer judgment by default. And the true question in this case is, whether this corporation had such notice of the suit, and was so far subject to the jurisdiction and laws of Ohio, that it was bound to appear, or take the consequences of nonappearance." Then, after laying down the general proposition that a corporation created by one state can only transact business in another state by the consent, express or implied, of the latter state, and that such consent may be accompanied by such conditions as the latter state may see fit to impose, provided such conditions are not repugnant to the constitution or laws of the United States, "or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation ³⁷⁴ without opportunity for defense," the opinion proceeds as follows: "In this instance, one of the conditions imposed by Ohio was, in effect, that the agent who should reside in Ohio, and enter into contracts of insurance there in behalf of the foreign corporation, should also be deemed its agent to receive service of process in suits founded on such contracts. We find nothing in this provision either unreasonable in itself or in conflict with any principle of public law." Accordingly, it was held that the service on the agent of the foreign corporation was good, and that the judgment rendered by the state court of Ohio was good and valid. It will be observed that the facts in the case just cited are somewhat different from those which appear in the case now under consideration, and, therefore, it is not direct authority on the point raised in this case. But we have cited it at some length, for the purpose of showing the fundamental principles which lie at the bottom of all questions of this kind.

The next case cited by counsel for respondent which we shall notice is *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354. In that case the question was as to the validity of a judgment rendered by a state court of Michigan against the Winthrop Mining Company, a foreign corporation, created under the laws of the state of Illinois, in an action commenced by service within the state of Michigan upon one Colwell, described simply as agent of the said Winthrop Mining Company, engaged in business in the state [of Michigan] when service was made on Colwell; and as it did not appear, even *prima facie*,

that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ upon him, and as the judgment was rendered by default, there was nothing to show that the Michigan court had acquired such jurisdiction of the foreign corporation as would entitle it to render a personal judgment against such corporation. In that case the remarks of Mr. Justice Field, who delivered the opinion of the court, would seem to show that the test as to whether the person upon ^{§75} whom service is made is such an agent as would render such service valid, is that such agent is the representative of the corporation in the state where the service is made at the time of such service. For Mr. Justice Field, after citing and commenting on a case from Michigan, in which the service was made on the treasurer of a foreign corporation, in the state of Michigan, where the treasurer happened to be casually and not on any business of the corporation, uses this language: "According to the view thus expressed by the supreme court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the state. This representation implies that the corporation does business *or has business in the state for the transaction of which it sends or appoints an agent there*" (italics ours). Again the learned justice says: "The transaction of business by the corporation in the state, *general or specific*, appearing, a certificate of service by the proper officer, or a person who is its agent there, would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business" (italics ours). The same doctrine was recognized in the subsequent case of *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. Rep. 559. In that case the plaintiff undertook to commence an action in a state court of New York against the defendant, a foreign corporation created by the laws of the state of Connecticut, and carrying on its business in that state only, and having no place of business, officer, agent, or property in the state of New York, by the personal service of the summons upon the president of such corporation in the city of New York, while temporarily there, where the corporation transacted no business; and the court held that the service on the president of the corporation while casually in the state of New York, and not charged with any business of the corporation there, was invalid, for the reason that the president could not, in any sense, be regarded as the representative of the corporation while casually in the state of New York, not

for the purpose of attending to any ³⁷⁶ business of the corporation there. Indeed, we find that in a number of cases which we have consulted, but which need not be cited here, it has been uniformly held by the supreme court of the United States that a state court cannot, in an action in personam, acquire jurisdiction of a foreign corporation simply by personal service of the summons upon the president or any other officer or agent of such corporation, while he happens to be casually in the state where the action is commenced, and not there for the purpose of attending to any business of such corporation; and to this doctrine we fully subscribe.

The next case decided by the supreme court of the United States, which is cited by counsel for respondent, is *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739, but we are unable to perceive what application that case has to the question which we are now considering. In that case, no question as to the validity of the service of any process was raised; for the sole question was whether noncompliance with a certain provision of the constitution of Colorado, and of the statute passed to carry into effect such constitutional provision, operated as a bar to the action. The action was brought by a corporation created by a law of the state of Ohio, and having its principal place of business at Mount Vernon, in that state, to recover damages for the breach of a contract, entered into in the state of Colorado, with the defendants, who were citizens of the state of Colorado, for the sale and delivery to them on the cars at Mount Vernon of certain machinery at a certain stipulated price. The defendants, amongst other defenses, pleaded: 1. That when the contract sued on was entered into, the plaintiff (a foreign corporation) had not made and filed the certificate required by the statute; 2. That at the time of the making of the contract, the plaintiff did not have a known place of business in the state of Colorado, and did not have an authorized agent or agents in the state upon whom process might be served. The plaintiff demurred to these two defenses and the demurrer was overruled. The argument ³⁷⁷ in behalf of the demurrer was that, inasmuch as the constitution of Colorado forbids a foreign corporation from doing any business in that state, "without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served," and inasmuch as the statute declared that "foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate

. . . . with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state residing at its principal place of business upon whom process may be served," etc., the failure to comply with these provisions operated as a bar to the action. But the supreme court of the United States held that the failure to comply with these provisions could not operate as a bar to the action—two of the justices holding that to give such a construction to the provisions of the constitution and the statute of Colorado would be a violation of the interstate commerce clause of the constitution of the United States; but the majority of the court rested their conclusion upon the ground that the provisions of the constitution and statute of Colorado could not be reasonably construed as forbidding the doing of a single act of business in that state, but the carrying on of business; and we presume the case was cited to show that doing a single act of business within the state of South Carolina by the defendant company would not justify the service of its agents while in this state for the purpose of attending to this single act of business done by defendant in this state. To say the least of it, this would be a strained inference to be drawn from the case cited; and besides, the majority of the court based its conclusion upon the peculiar phraseology used in the constitution and statute of Colorado, and our statute contains no such phraseology.

We have not deemed it necessary to comment upon the ³⁷⁸ case of *Pennoyer v. Neff*, 95 U. S. 714, cited by counsel for respondent, for the reason that, in that case, there was no personal service within the state of Oregon, but the service was made by publication, and it was accordingly there held that a personal judgment is without any validity, if it be rendered by a state court in an action upon a money demand against a non-resident of the state, who was served by a publication of the summons, but upon whom no personal service of process within the state was made, and who did not appear; and no title to property passes by a sale under an execution issued upon such a judgment. Indeed, remarks made by Mr. Justice Field in delivering the opinion of the court seem to imply that the result would have been different if the service had been made within the state of Oregon. For he says: "Process from the tribunals of one state cannot run into another state, and summon parties

there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice, within the state where the tribunal sits, cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.' Substantially the same remarks are made by the same justice in the subsequent case of *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165, recognizing and following *Pennoyer v. Neff*, 95 U. S. 714.

Nor do we propose to refer to the cases cited by counsel for respondent, from the Federal Reporter and from other states (with one exception), for two reasons: 1. Because they are not decisions of courts of final resort in questions of this kind; 2. Because a consideration of such cases would unduly protract this opinion to an unreasonable length. The excepted case above referred to is the case of *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499—reported also in 22 Am. St. Rep. 433, 25 Pac. 325—and the reason for making the exception is that it was cited as authority for the following proposition: "A single sale of machinery ³⁷⁹ within the state [of Colorado] by a foreign corporation does not constitute doing business, within the meaning of the statute," but an examination of the case will show that it does not sustain the above-quoted proposition, if it is supposed to refer to the statute regulating the service of process upon a foreign corporation, for it manifestly refers to a different statute—section 260 of the General Statutes of Colorado declaring that: "Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state, and in the office of the recorder of deeds in the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state, residing at its principal place of business, upon whom process may be served." Whereas the statute prescribing the mode of serving a foreign corporation is found in section 40 of the Code of Civil Procedure, and reads as follows: "If the suit be against a foreign corporation, . . . service shall be made by delivering a copy of the writ to an agent, cashier, treasurer, or secretary thereof; in the absence of such agent, cashier, treasurer, or secretary, to any stockholder." The facts

as reported in the case are substantially as follows: The plaintiff, a domestic corporation, doing business in the city of Denver, Colorado, contracted in writing with the defendant, a foreign corporation, engaged in mining in New Mexico, to manufacture, furnish, and set up for the defendant in New Mexico, certain machinery for the reduction of ore, for a stipulated price. The contract was performed by plaintiff, and large payments had been made on the contract, leaving, however, a considerable balance due on the same, for the recovery of which the action was brought. Service of the summons was made by delivering a copy thereof to one Samuel Alsop, a stockholder in the defendant corporation. This service was set aside by the court below, and the plaintiff appealed. ³⁸⁰ In the opinion of the supreme court it is stated that "the first and most important question to be determined is, whether appellants could be subjected to the jurisdiction of the courts of this state," it being contended that the defendant, a foreign corporation, had not, by its acts and dealings in the state of Colorado, submitted itself to the jurisdiction of the courts of that state, and that this cause could not there be tried and determined. This contention was based upon the conceded fact that the defendant had not complied with the provisions of section 260 of the General Statutes of Colorado above referred to, forbidding foreign corporations from doing business in that state until they had complied with the provisions of said section. The court, however, declined to sustain such contention, holding that a single purchase of machinery in Colorado cannot be regarded as doing business "in this state, as contemplated *in such section*" (italics ours). The court then proceeded to inquire whether the state court had obtained jurisdiction of the defendant by the service upon Alsop; and after setting out the provisions of section 40 of the Code of Civil Procedure, as quoted above, used this language: "We conclude, therefore, that the contracting of the debt in question was a sufficient doing business within this state to render the corporation amenable to the courts of this state, if jurisdiction could be obtained by service of process as provided in section 40 of the code." And after finding as a fact (which was contested by appellant) that Alsop was a stockholder of the defendant corporation at the time he was served with the summons, held that such service was sufficient to bring the defendant within the jurisdiction of the state, and reversed the finding of the circuit court to the contrary. So that the case just considered

is really in favor of, rather than opposed to, the view which we adopt.

We may also cite the case of *Ford v. Calhoun*, 53 S. C. 106, 30 S. E. 830, in which it was held that the circuit court may acquire jurisdiction of the person of a nonresident by the service of a summons upon him, while in this state, whether he ³⁸¹ have property here or not. In that case, after citing the statutory provision upon the subject, the court used this language, which seems quite pertinent to the present inquiry: "Besides this explicit statutory provision, the reason of the thing supports our view. The object of the service of any legal process is to notify the party served of the proceeding against him, and to obtain jurisdiction of his person, and both of these objects are attained where a person, whether a nonresident or a resident of this state, has been personally served within the jurisdiction of the court where such proceeding is pending." For in the case under consideration there can be no doubt that the defendant corporation had, by the service of the summons on its agent, Schminke, full notice of the proceeding in ample time to have served its answer, as is conclusively shown by the fact that the defendant was notified in time to employ counsel, and prepare and submit affidavits in support of the motion to set aside the service of the summons. It is true that in *Ford v. Calhoun*, 53 S. C. 106, 30 S. E. 830, the question was as to the service upon a natural, and not upon an artificial, person, like a corporation. But as we understand the decisions of the supreme court of the United States, there is no difference whether the question is as to the service of an individual nonresident and a foreign corporation, provided the service, in case of a corporation, is made upon an officer or agent of the corporation, who is acting as the representative of such corporation at the time of service—a matter which will hereinafter be considered. The only other authority which we propose to cite is the recent decision of the supreme court of the United States in the case of *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. Rep. 308, in which this whole subject is considered at length. That case, in some of its features, is very much like the case now under consideration. In that case the summons was served on an agent of a foreign corporation while temporarily (though not casually) in the state of Tennessee, where he had been sent by the foreign corporation to look into the claim out of which ³⁸² the cause of action arose upon which the suit was brought in the state court of Ten-

nessee, and the supreme court held that by such service the state court acquired jurisdiction of the foreign corporation, and that the judgment of the state court, though obtained by default, was a good and valid judgment. In that case, Mr. Justice Peckham, in delivering the opinion of the court, after declaring that it is not necessary that the agent upon whom service is made should be expressly invested with authority to receive service or process in behalf of the foreign corporation, but that authority may be implied, uses the following language: "If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable, and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority and service under such circumstances, and service upon an agent of that character would be sufficient."

As we have seen above, and as is held in the case last cited, the character of the agency depends upon the inquiry whether the agent can be regarded as the representative of the corporation in respect to the transaction out of which the suit arises. The practical inquiry, therefore, is whether George F. Schminke was the representative of the defendant corporation in this state in regard to the transaction out of which this controversy arose. This must be determined by an examination of the undisputed testimony in the case, proceeding largely, and in fact entirely, from the defendant corporation itself. It must be remembered that the circuit judge did not find that Schminke was not the agent of the defendant, and, indeed, could not have so found without totally disregarding all of the testimony in the case. All that he found was that Schminke was not, in his opinion, "an agent, in the sense in which 'any agent' is used in the code"; and this was a conclusion of law, based upon his construction of the meaning of the words "any agent," as ³⁸³ used in the code, and was not a finding of fact at all, except that his phraseology implies that he found as a fact that Schminke was an agent of the defendant company, but that according to his construction of the language of the code, he was not such an agent as the code contemplated. This court is, therefore, at liberty to consider and determine for itself, from the undisputed testimony in the case, whether George F. Schminke must be regarded as such a representative of the defendant corporation, in reference to the transaction out of which this action arose, as would, under the decisions of

the supreme court of the United States, justify the service of the summons upon Schminke. It seems to us that the letters of the defendant corporation, used at the hearing of this motion below, fully show that Schminke, when served with the summons in this state, was here as the representative of the defendant corporation in the very transaction out of which this controversy arose. In the first letter, under date of 23d of October, 1900, which shows on its face to have been written in reply to a letter from plaintiff to defendant, of the 6th of October, 1900, which was not offered in evidence, but its tenor may be inferred from the reply to have been a notification or complaint of the deficiency in the machinery, the defendant says, amongst other things: "We have written our Mr. George F. Schminke, who will be in Abbeville now in about ten days, and we will get a full report from him"; and expresses the hope that plaintiff "will bear with us" for a while. To this letter plaintiff replied by letter dated 27th of October, 1900, in which, after stating that plaintiff was taking steps to buy a new machine, as they could not afford to be delayed any longer in the matter, the following language is used: "Now, in consideration of what you say in your last about sending your Mr. Schminke to Abbeville by the 3d proximo, we will defer buying the machine above referred to until the 5th proximo, provided you write us at once that your authorized representative will be in Abbeville by the above date, with power to act, so that we may be assured of a speedy settlement." To this letter ~~284~~ defendant replied, under date of 29th of October, 1900, in which, after saying that they had telegraphed "our Mr. George F. Schminke," asking him to wire defendant when he would be in Abbeville, and after saying that they had no doubt that Schminke would be able to reach Abbeville not later than the 5th of November, etc., used this language: "We trust that you will defer action on this matter until you give *us* an opportunity to look over the ground for *ourselves*, *which we will do when our Mr. Schminke arrives in Abbeville.*" And again, on the 1st of November, 1900, the defendant wrote plaintiff: "Our Mr. G. F. Schminke will be in Abbeville on the 5th instant; and we are writing him fully to-day regarding the situation there." If the language which we have quoted above, especially that which we have italicized, does not show that Schminke was sent to Abbeville as the representative of defendant in relation to the very matter in dispute between the parties, then we are at a loss to conceive what language could

show more conclusively that fact. If so, then the service of the summons upon Schminke, while in Abbeville, for the purpose of representing the defendant corporation in the very matter in dispute between the parties, would be held by the supreme court of the United States, even apart from our own Code of Procedure, a valid service upon the defendant corporation. For, as said by Mr. Justice Field, in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 362: "While service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the state where such service is made, yet if he is the representative of the corporation in the state at the time the service is made, such service would be sufficient; and this representation implies that the corporation does business, or has business, in the state, for the transaction of which it sends or appoints an agent there." We are of opinion, therefore, that service upon the agent of the defendant corporation, while in this state for the purpose of attending to the business of the corporation here, in any view that may be taken of the case, was ³⁸⁵ a good service, and that the circuit judge erred in holding otherwise.

The judgment of this court is, that the order of the circuit judge setting aside the service of the summons in this case, and dismissing the case for want of jurisdiction, be reversed, and that the case be remanded to the circuit court for Abbeville county for such further proceedings as may be necessary, with leave to the defendant to serve its answer within twenty days after written notice to the counsel who represented the defendant at the hearing of the motion to set aside the service of the summons of the filing of the remittitur in this case in the circuit court for Abbeville county.

JURISDICTION OF FOREIGN CORPORATIONS.

- I. Citizenship and Residence of Corporations for Jurisdictional Purposes.**
 - a. Corporations are Persons Residing in the States Under Whose Laws They were Created.
 - b. Citizenship of Corporations.
 - c. Citizenship of Corporations in Two or More States.
- II. What Brings a Foreign Corporation Within the Jurisdiction.**
 - a. Statutory Authority to Sue Foreign Corporations.
 - b. Must Mode of Service be Specially Prescribed by Statute.
 - a. Restricting Operation of Statute to Domestic Corporations.

- d. What is a Coming Within a State so as to Give Its Courts Jurisdiction in Personam.
- e. Mere Presence of an Officer or Agent Within the State.
- f. Doing Business Within a State Subjects a Foreign Corporation to the Jurisdiction of Its Courts.
- g. What is a "Doing Business Within a State."
- h. Ceasing to do Business Within a State.

III. Jurisdiction of the National Courts.

- a. Right of Corporation as a Citizen of the State Creating It.
- b. Corporations of Foreign Countries.
- c. Citizenship in Two or More States.
- d. Right of Foreign Corporation to be Sued Only in the District of Which It is an Inhabitant.
- e. Right to Remove Suits to the National Courts.

IV. Of the Causes of Action of Which Jurisdiction may be Entertained.

- a. Causes Arising Beyond the State, or Existing in Favor of Nonresidents.
- b. Includes all Transitory Causes of Action.
- c. Suits in Equity.
- d. Proceedings in Rem.
- e. Proceedings by Attachment and Garnishment.

V. Of the Discretion of Courts to Refuse to Exercise Jurisdiction.

VI. Mode of Serving Process.

- a. Designating by Contract.
- b. Power of the States to Prescribe How and on Whom Process may be Served.
- c. Power of the States to Provide for Service on any Agent or Employee.
- d. Service Where the Corporation Failed to Designate an Agent.
- e. Managing Agents on Whom Process may be Served.
- f. Agents on Whom Process may be Served.
- g. Service on Agents Whose Authority has Terminated.
- h. The Mode of Service Prescribed by the Statute must be Pursued.
- i. Cumulative Modes of Service.
- j. The Return of Service of Process.

VII. The Effect of the Judgment.

I. Citizenship and Residence of Corporations for Jurisdictional Purposes.

- a. Corporations are Persons Residing in the States Under whose Laws They were Created.—It is well known that the jurisdiction of the courts of no state or nation extends to persons who

are nonresidents thereof, and who are not served with process within its limits, unless they voluntarily submit themselves to such jurisdiction: *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345; *Pennoyer v. Neff*, 95 U. S. 714; *Insurance Co. v. Bangs*, 103 U. S. 441; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354. A corporation, whether domestic or foreign, is a person: *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 59 Pac. 304; *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779, 62 N. W. 320; *Railroad Co. v. Harris*, 99 Tenn. 684, 43 S. W. 115; *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682, 53 S. W. 955; *Covington etc. Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. Rep. 198; *Gulf etc. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255. It would seem to follow that before a corporation can be subjected to the jurisdiction of the courts of a state or country, it must be present therein, and that it can be so present only when it has been incorporated under its laws, or has, like a natural person, gone thereto from the state of its residence, or has in some other manner consented to their jurisdiction over it. Its domicile or residence is in the state under whose laws it is created: *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 282, 19 South. 172; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 39 N. E. 1091; *Ireland v. Globe etc. Co.*, 19 R. L. 180, 61 Am. St. Rep. 756, 32 Atl. 921; *Combes v. Keyes*, 89 Wis. 297, 46 Am. St. Rep. 839, 62 N. W. 89; though it may, by consent of other states, express or implied, do business therein and become subject to the jurisdiction of their courts. A foreign corporation must, therefore, be regarded as a nonresident of the state, though it does business therein, and may, because of so doing, be subject to the jurisdiction of its courts: *Boyer v. Northern P. Ry. Co. (Idaho)*, 66 Pac. 826.

b. Citizenship of Corporations.—Citizenship, for the purposes of jurisdiction, is as to each corporation in the state under whose laws it was created and has its existence. A foreign corporation, if created under the laws of a sister state, must be regarded, for the purposes of jurisdiction, as a citizen of the latter, notwithstanding it may, by doing business in the former or otherwise, have become subject to suit therein: *Wilson v. Triumph etc. Co.*, 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300; *Hawley v. Hurd*, 72 Vt. 122, 82 Am. St. Rep. 922, 47 Atl. 401; *Rece v. Newport etc. Co.*, 32 W. Va. 164, 9 S. E. 212; *Railway Co. v. Whitton*, 13 Wall. 270; *Muller v. Dows*, 94 U. S. 445; *Pennsylvania etc. Co. v. Railroad Co.*, 118 U. S. 298, 6 Sup. Ct. Rep. 1094; *Goodlett v. Louisville etc. R. R. Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. Rep. 526.

c. Citizenship of Corporations in Two or More States.—A corporation, unlike a natural person, may at the same time be a citizen

of two or more states. Of course, it cannot be created a corporation in several states by one charter, for the reason that concurrent action by the state legislatures is impossible, but, after being created a corporation in one state, it may also, by the legislative authority of another state, be declared to be a corporation of that state, in which event it may be treated, as to business transactions within each state, as a citizen thereof: *Railroad Co. v. Vance*, 98 U. S. 450; *Memphis etc. R. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. Rep. 432; *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. Rep. 878.

This result does not follow, however, from the mere fact that a corporation, after being created in one state, is authorized to do business in another, as where, being a railway corporation chartered under the laws of its domicile, it is subsequently by legislative or other action in other states, authorized to extend and operate its road therein. By such extension and operation it doubtless subjects itself to the jurisdiction of the courts of the other states, but it does not become a citizen thereof, and it remains in their courts entitled to the privileges of nonresident citizens: *Port Royal R. R. Co. v. Hammond*, 58 Ga. 523; *Alabama etc. R. Co. v. Fulghum*, 87 Ga. 263, 13 S. E. 649; *State v. Northern C. R. Co.*, 18 Md. 193; *Baltimore etc. R. R. Co. v. Harris*, 12 Wall 65; *Stone v. Farmers' etc. Co.*, 116 U. S. 307, 6 Sup. Ct. Rep. 834, 388, 1191; *Goodlett v. Louisville etc. R. R. Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254.

II. What Brings a Foreign Corporation Within the Jurisdiction.

a. **Statutory Authority to Sue Foreign Corporations.**—The statement has been made, with much positiveness, that an action could not, by the common law, be sustained against a foreign corporation: *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 86, 25 South. 697; *Middlebrooks v. Springfield etc. Ins. Co.*, 14 Conn. 301; *Peckham v. North Parish*, 16 Pick. 274; *Andrews v. Michigan etc. Co.*, 99 Mass. 534, 97 Am. Dec. 51; *McQueen v. Middletown M. Co.*, 16 Johns. 5; *Lathrop v. Union P. R. Co.*, 7 D. C. 11, 1 McAr. 234; *Clarke v. New Jersey S. N. Co.*, 1 Story, 531, Fed. Cas. No. 2859; but the reasons given indicate that the real difficulty was rather in the service of process than in the absence of jurisdiction in the courts to sustain the action. Thus, it was doubtless true that a corporation existed only under the laws of the country creating it, and that it generally had no principal officer or agent outside of that country on whom service of process could properly be made, and hence it was practically, in the great majority of cases, beyond the jurisdiction of the courts of any other country.

b. **Must Mode of Service Be Specially Prescribed by Statute?**—Assuming that by the common law no authority existed for enter-

taining jurisdiction over a foreign corporation, it has been insisted that such authority, when it exists, depends solely upon the statute of the state where the suit is brought; that any service therein, no matter upon whom, must prove abortive, unless some statute can be referred to authorizing it: *Ahern v. National S. S. Co.*, 3 Daly, 399; *Chase v. Vanderbilt*, 37 N. Y. Super. Ct. 834; *Anglo-American P. Co. v. Davis P. Co.*, 50 App. Div. 273, 63 N. Y. Supp. 987; *Nutter v. Messageries Maritimes*, 54 L. J. Q. B. 527; and finally, that general words or declarations in a statute are not sufficient, but that it must, in express terms, or by necessary implication, apply to foreign corporations.

So far as the national courts are concerned, it is settled that no express statutory authority need be found to authorize the service of process on a foreign corporation, and though it be conceded that under particular circumstances there is no statute of a state authorizing the service of process therein, yet that such process may be so served if the action is brought in one of the national courts, and the corporation, being one created under the laws of another country, has general agents managing its business in the state where such process is served. The court said: "The manifest injustice which would ensue if a foreign corporation, permitted by a state to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus while allowed the benefits, be exempt from the burdens, of the laws of the state, has induced many states to provide by statute that a foreign corporation, making contracts within the state, shall appoint an agent residing therein upon whom process may be served in actions upon such contracts. This court has often held that whenever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the state, or, when consistent with the acts of Congress, in the courts of the United States, held within the state, but it has never held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States"; and further, "that the liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there": *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. Rep. 526. We therefore doubt, if the question were necessarily presented, whether it would be held in any state, not bound by pre-existing decisions long acquiesced in, that a corporation doing, and permitted to do, business in a state, and therefore entitled to resort to its courts, cannot be sued therein, though no statute expressly so declares.

c. **Restricting Operation of Statutes to Domestic Corporations.**—Statutes in general terms authorizing suits against, or the service

of process upon, corporations, have, in some instances, been construed as applying to domestic corporations only: *People v. Judge of Wayne Circuit Court*, 24 Mich. 38. The decided weight of authority now declares otherwise, and maintains that statutes in general terms authorizing the maintenance of suits against, or the service of process upon, corporations apply to foreign corporations doing business within the state, and having officers or agents therein, upon whom service may be made: *Eagle L. Assn. v. Redden*, 121 Ala. 346, 25 South. 779; *Sill v. Bank of United States*, 5 Conn. 102; *Gross v. Nichols*, 72 Iowa, 239, 33 N. W. 653; *Chicago etc. Ry. Co. v. Manning*, 23 Neb. 552, 37 N. W. 462; *New York L. L. Co. v. Best*, 23 Ohio St. 105; *Humphreys v. Newport etc. Co.*, 33 W. Va. 135, 10 S. E. 39; *Societe Fonciere etc. v. Milliken*, 135 U. S. 804, 10 Sup. Ct. Rep. 823.

d. **What is a Coming Within a State so as to Give Its Courts Jurisdiction in Personam.**—It being clear that the jurisdiction of an action against a foreign corporation is not dependent on causes of action arising within the state or country, nor upon the plaintiff's being a citizen or resident it is evident that the true and only test of such jurisdiction is, May the corporation properly be regarded as within the state or country where process is served upon it in those cases in which it has not voluntarily appeared or otherwise submitted to the jurisdiction? With respect to a natural person, there is no doubt that the courts of no state have jurisdiction over him to the extent of rendering a valid judgment in personam, unless he is served with process within its limits, or has waived his right to objection when it was not so served. This remains true, though he may have embarked in business there, or may there be represented by agents whose authority is as general and comprehensive as possible, provided he has not expressly stipulated that service of process against him may be made upon them. With a corporation, the rule is otherwise. It may appoint agents for the purpose of doing business within a state, or of there receiving service of process, and whenever it does so, it constructively comes within the state, and is subject to the jurisdiction of its courts as are other nonresidents who can be found therein. Having done either of these acts, it is helpless to deny to its agents authority to receive such service, or, in other words, it cannot exclude itself from the jurisdiction of the courts: *Connecticut etc. Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. Rep. 308.

e. **Mere Presence of an Officer or Agent Within the State.**—Here we may stop to inquire whether it is the doing of business within a state or country or the personal presence there of some agent or the principal officer which brings a foreign corporation therein to the extent of subjecting it to the jurisdiction of the courts. If a corporation has designated some person as its agent

for the purpose of receiving service of process within the jurisdiction, this, though probably to some extent coerced by some statute, is an express consent that the courts may take jurisdiction over it. No such consent is inferable from the mere presence of an officer or agent in the state, whatever be his rank in the corporation, or however extensive his authority. He and the corporation, nevertheless, remain two distinct persons, the one natural, and the other artificial, and the presence of either within the state by no means implies the presence of the other for the purposes of jurisdiction, or otherwise. So long as a corporation refrains from doing business in a state other than that of its creation, the courts of such other states cannot exercise jurisdiction in personam over it, unless it voluntarily submits thereto, and the presence of any of its officers is not, irrespective of their rank, such a submission. It must further appear that, in addition to the presence of such an officer within the state, there has been such a doing of business therein as, in contemplation of law, brings the corporation within the state for the purposes of the jurisdiction sought to be exercised: *Galveston C. R. Co. v. Hook*, 40 Ill. App. 547; *Midland P. R. Co. v. McDermid*, 91 Ill. 170; *J. B. Watkins L. M. Co. v. Elliott*, 62 Kan. 291, 84 Am. St. Rep. 385, 62 Pac. 1004; *Newell v. Great Western Ry. Co.*, 19 Mich. 336; *Latimer v. Union P. Ry. Co.*, 43 Mo. 105, 97 Am. Dec. 378; *Moulin v. Trenton etc. Ins. Co.*, 24 N. J. L. 222; *Camden R. M. Co. v. Swede Iron Co.*, 32 N. J. L. 15; *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. 275; *Chase v. Vanderbilt*, 37 N. Y. Super. Ct. 334; *Aldrich v. Anchor etc. Co.*, 24 Or. 32, 41 Am. St. Rep. 831, 32 Pac. 756; *Phillips v. Library Co.*, 141 Pa. St. 462, 23 Am. St. Rep. 304, 21 Atl. 640; *Carstens v. Leidigh etc. Co.*, 18 Wash. 450, 63 Am. St. Rep. 906, 51 Pac. 1051; *Good Hope Co. v. Railway etc. Co.*, 23 Blatchf. 43, 22 Fed. 635; *American W. W. Co. v. Stem*, 63 Fed. 676; *Rust v. United Waterworks Co.*, 17 C. C. A. 16, 70 Fed. 129; *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. 433; *Fidelity etc. Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. 850; *St. Louis W. M. Co. v. Consolidated B. W. Co.*, 32 Fed. 802; *Bentlif v. London etc. Corp.*, 44 Fed. 667; *Mecke v. Valletown M. Co.*, 35 C. C. A. 151, 93 Fed. 697; *De Castro v. Compagne Francais*, 76 Fed. 425; *Eirich v. Donnelly C. Co.*, 104 Fed. 1; *Reilly v. Philadelphia etc. Ry. Co.*, 109 Fed. 349; *Conley v. Mathieson Alkali Works*, 110 Fed. 730.

In perhaps a majority of the cases just cited, the officer upon whom process was served was within the state casually and accidentally, on pleasure or on business, in which the corporation was not interested, but we do not conceive that the purpose of his visit or its duration is material so long as the corporation does not so engage in business that it is thereby brought within the jurisdiction. In truth, the officer may be a permanent resident of the state without giving the corporation itself any residence there, so as to subject it to the jurisdiction of the courts: *Schmidlapp v. La Conflance*

Ina. Co., 71 Ga. 246; *Ambler v. Archer*, 1 App. D. C. 94. "Where a foreign corporation is not doing business in a state, and the president or other officer is not there transacting business for the corporation, and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon him": *Fitzgerald etc. Co. v. Fitzgerald*, 137 U. S. 106, 11 Sup. Ct. Rep. 86.

There are decisions in the state courts not in harmony with the views here expressed, and which may amount to an affirmation that the presence of an officer of a foreign corporation within a state is of itself sufficient to authorize the service of process against it upon him, and that such service will support any subsequent judgment based thereon: *Gravely v. Southern Ice Mach. Co.*, 47 La. Ann. 889, 16 South. 866; *Shickle etc. Iron Co. v. Wiley Const. Co.*, 61 Mich. 226, 1 Am. St. Rep. 571, 28 N. W. 77; *Guernsey v. American Ins. Co.*, 13 Minn. 278; *Klopp v. Creston etc. Waterworks Co.*, 84 Neb. 808, 33 Am. St. Rep. 666, 52 N. W. 819; *Moulin v. Trenton etc. Ins. Co.*, 25 N. J. L. 57; *Hiller v. Burlington etc. R. R. Co.*, 70 N. Y. 223; *Pope v. Terre Haute etc. Mfg. Co.*, 87 N. Y. 137. Whether this course of decision will be persisted in since the supreme court of the United States has determined the question, we cannot say. It may be that the state decisions are sustainable to the extent of giving judgments like those in question the same effect as if founded on the service of process without the state, in which event they may be enforced against the property of the corporation found within the state and by attachment or otherwise, brought within the jurisdiction of the court, but cannot be allowed effect as judgments in personam against the corporation. It is true that the decisions of the supreme court of the United States have not proceeded so far as to hold that such a judgment may not be conceded the effect of a judgment in personam within the states where rendered, but they have expressly determined that they cannot be accorded that effect in other states or in the national courts.

Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. Rep. 539, was an action for libel brought in the state of New York by a citizen and resident thereof by a corporation organized and doing business in the state of Connecticut. The summons was served in the former state on the president of the corporation while therein temporarily. The defendant appeared therein specially and for the sole purpose of presenting a petition for its removal to the circuit court of the United States, and, upon such removal, applied for an order setting aside the service of summons, upon the ground that being a corporation of Connecticut, where it solely carried on business, and having no agent within the state of New York clothed with authority to there represent it, process could not be served on its officers temporarily within the state. The motion was granted, and the plaintiff sued out a writ of error, but the judgment was

affirmed, and in the opinion of affirmance the supreme court of the United States said: "So a judgment rendered in the court of one state, against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state, or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with any business of the corporation there: *Lafayette Ins. Co. v. French*, 18 How. 404; *St. Clair v. Cox*, 106 U. S. 350, 357, 359, 1 Sup. Ct. Rep. 354; *Fitzgerald etc. Co. v. Fitzgerald*, 137 U. S. 98, 106, 11 Sup. Ct. Rep. 36; *Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 184, 13 Sup. Ct. Rep. 859; *In re Hohorst*, 150 U. S. 656, 663, 14 Sup. Ct. Rep. 221. The principle which governs the effect of judgments of one state in the courts of another state is equally applicable in the circuit courts of the United States, although sitting in the state in which the judgment was rendered. In either case, the court, the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments: *Pennoyer v. Neff*, 95 U. S. 714, 732, 733. For the same reason, service of mesne process from a court of a state, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no effect in the circuit court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of the general appearance, or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court."

2. **Doing Business Within a State Subjects a Foreign Corporation to the Jurisdiction of Its Courts.**—As it is not the mere presence of an officer or agent of a corporation within the state or country which gives its courts jurisdiction, it is clear that such jurisdiction must be supported by some other and more adequate foundation, and such can be found, as already stated, in some voluntary act of the corporation, which is equivalent to a waiver of the right to object to the jurisdiction of the court, either altogether, or in relation to some transaction or class of transactions. This waiver is necessarily implied from what is commonly called "doing business within the state." Each state has the right to exclude foreign corporations from exercising their franchises or doing business therein, and when, instead of so excluding them, it expressly or impliedly permits them to do business within its limits, it may be assumed to have stipulated for, and the corporation to have consented that, citizens and residents of the state should not be without redress there against the corporation when causes of

action arise against it or in favor of them. At all events, it is admitted, practically without dissent, that a corporation doing business within a state or country thereby becomes a resident thereof to an extent which authorizes the legislature to enact laws providing for the service of process within its limits upon any officer or agent of the corporation who may be found therein, and, upon such service, to proceed to final judgment to the same extent, and with like effect, as if it were a natural person not a citizen of the state, but personally served with process therein by authority of its laws: *Equitable etc. Soc. v. Vogel*, 76 Ala. 441, 52 Am. Rep. 344; *Lawrence v. Ballou*, 50 Cal. 258; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Fidelity etc. Assn. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Harding v. Chicago etc. R. R. Co.*, 80 Me. 659; *National C. M. Co. v. Brandenburgh*, 40 N. J. L. 111; *Fisk v. Chicago etc. R. R. Co.*, 53 Barb. 472; *Merchants' Mfg. Co. v. Grand Trunk Ry. Co.*, 63 How. Pr. 459; *Robeson v. Central R. R. Co.*, 76 Hun, 444, 28 N. Y. Supp. 104; *Robertson v. National S. S. Co.*, 14 N. Y. Supp. 813; *Hiller v. Burlington etc. R. R. Co.*, 70 N. Y. 223; *Central etc. Co. v. Georgia etc. Co.*, 32 S. C. 319, 11 S. E. 192; *Peters v. Neely*, 84 Tenn. 275; *Baltimore etc. R. R. Co. v. Noell*, 32 Gratt. 394; *Dallas v. Atlantic etc. R. R. Co.*, 2 McAr. 146; *Merchants' Mfg. Co. v. Grand Trunk Ry. Co.*, 13 Fed. 358; *Van Dresser v. Oregon etc. Nav. Co.*, 48 Fed. 202.

g. **What is a "Doing Business Within a State."**—The difficult and, perhaps, not finally determined, question, is, What is a "doing business within a state" which authorizes courts to exercise jurisdiction in personam over a foreign corporation not voluntarily submitting thereto? Many of the states have enacted statutes requiring foreign corporations, before doing business therein, to designate some person on whom service of process may be made, or to do some other act which the statute prescribes as a condition precedent to the doing of business; and these statutes often impose penalties upon corporations without first complying with these conditions precedent, or seek to deny them the right to resort to the courts of the state for redress upon, or enforcement of, causes of action existing in their favor. It may be that decisions determining what is or is not a doing business within the meaning of these statutes are not applicable when the question is not one whether a penalty is to be enforced, or a right of action denied, but, on the other hand, is whether a foreign corporation has subjected itself to the jurisdiction of the court. When the question involved is not jurisdictional, there is no doubt that isolated acts of a foreign corporation within a state do not constitute a doing of business, so as to subject it to a penalty or to warrant the denial of its right to resort to the courts of the state for redress: *Thompson on Corporations*, sec. 7936. We believe, however, that the majority of the de-

cisions take practically the same view of the question when it involves the jurisdiction of the court.) It is true that in cases arising in the state courts where it was admitted that the only act done by the corporation within the state was the purchasing of certain machinery, it was held that, though such act was not a "doing business," as that term was commonly understood, yet that thereby the corporation necessarily submitted itself to the jurisdiction of the courts of the state to the extent of authorizing the maintenance therein of an action arising out of such purchase, or relating to such machinery and the service of process therein on one who acted as agent of the corporation in making the purchase: *Colorado I. W. Co. v. Sierra Grande M. Co.*, 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 825; *Abbeville etc. Electric Co. v. Western etc. Supply Co.*, 61 S. C. 361, ante, p. 890, 39 S. E. 559. Precisely the contrary conclusion was reached in another state where the circumstances were substantially identical. A corporation of New Jersey purchased certain machinery at sheriff's sale in Maryland, and received possession thereof. Subsequently a citizen of Maryland claimed that he had become entitled to the machinery under a contract of purchase with the corporation, and, for the purpose of obtaining such possession, sued out a writ of replevin and caused service of process to be made on an agent of the corporation. It appeared for the purpose of filing a motion to quash the service, on the ground that it was not chartered by the laws of the state, and did not hold or exercise franchises therein at the time of the service of the writ. The court said: "It is conceded that the appellee is a foreign corporation, having no place of business within this state, and that it has, so far as the record discloses, had no dealings or transactions in this state other than the purchase by it of the electrical machinery hereinbefore mentioned. Upon this state of facts, has the appellant a legal right to maintain this action by making service of the writ upon the agent of the appellee, who was, at the time of such service, temporarily within the state of Maryland? In determining the liability of a corporation to process and action within a state foreign to its creation, it is oftentimes important to ascertain the extent and character of the dealings or transactions had or done within such state." The court reached the conclusion that the corporation had not engaged in business within the state in a sense which justified the service of process upon it, and therefore affirmed the action of the trial court in quashing such service: *Crook v. Girard L. & M. Co.*, 87 Md. 138, 67 Am. St. Rep. 325, 39 Atl. 94.

The code and constitution of Alabama purport to authorize suits against foreign corporations in any county wherein they do business. It appeared that a railway corporation had an agent or employé in the possession of a line of railroad which it had constructed in a particular county, together with a machine which it had used in the loading of cars and lumber. The operation of a mill which it had

had in the same neighborhood, as well as the operation of the railroad, had been suspended, and the machinery and property were unused. The service of process was made upon the theory that, by thus caring for and protecting its property, and paying taxes thereon, the corporation had done or was doing business within the county; but it was held that these acts did not constitute a doing of business, or any part, for which it was created or organized, and that if not, it was not doing business within the meaning of that term as used in the code and constitution of the state: *Sullivan v. Sullivan T. Co.*, 103 Ala. 371, 15 South. 941.

A corporation of Kansas, having its chief office in that state, was accustomed to make occasional purchases of raw material either by correspondence or by sending an agent for that purpose to St. Louis, in the state of Missouri. Having purchased a considerable quantity of wire in that city, a controversy arose between it and the vendor, and one of its managing agents proceeded to St. Louis, for the purpose of adjusting the difficulty, and while there, he was served with process as an agent of the corporation. It was held that this service of process could not be sustained, for the reason that the corporation was not, in contemplation of law, engaged in business in the state. The court said: "When it is said that a corporation is engaged in business in a foreign state, and for that reason has voluntarily subjected itself to the operation of the laws of such foreign state regulating the service of process on foreign corporations, reference is plainly had to business operations of the corporation carried on within the state through the medium of agents appointed for that purpose, that are continuous, or, at least, of some duration, and not to business transactions that are merely casual, such as an occasional purchase of goods or of material within the foreign state. The result is that the service in the present case must be held insufficient to sustain a judgment against the corporation, because the corporation in question was not engaged in business in this state within the meaning of the various decisions of the supreme court on that subject": *St. Louis W. M. Co. v. Consolidated B. W. Co.*, 32 Fed. 802.

An Alabama corporation desiring to borrow money, and, to that end, to have its bonds listed on the stock exchange, sent its president to New York City, where he appeared on several occasions before a committee of the stock exchange. Soon thereafter summons was served upon the president in the state of New York, and the question was presented of whether the courts of that state acquired jurisdiction over the corporation. In denying that they did, the circuit court of the United States said: "The only question therefore, which is left for decision upon this application is, whether the corporation defendant was at the time of the service of summons engaged in business in this state. That question must be determined by what it had done, or was doing, at that time,

rather than by what it might do thereafter. That it will probably hereafter provide a regular agency in this state for the continuous transaction of the business of registration and transfer of its bonds and payment of interest on the coupons during the continuance of the mortgage is immaterial. The only business which it had done was the borrowing of money upon its bond and mortgage, and the obtaining from the stock exchange of the privilege of having such bonds called on the list of securities dealt in on its floor. It could apparently have secured this privilege and could have sold its bonds by correspondence. It kept no office here. It did not continuously, or even for a period of some duration, carry on here the business which it was organized to carry on, and by the regular transaction of which it gave evidence of its continued existence. It cannot, therefore, be held, under the authorities, that the defendant was, when served, engaged in business in this state, so as to make the service of summons efficient to bind the corporation": *Clews v. Woodstock Iron Co.*, 44 Fed. 31.

A broker in San Francisco, California, at his own solicitation, was furnished prices by a machinery manufacturing company of Illinois, and occasionally made sales of articles made by it, to be delivered on board the cars at the factory, adding to the prices given him a commission for himself. In denying that the transaction with such broker constituted a doing business within California, the court said: "The appellee herein was not under any restriction from selling its machinery in the state of California. It was not required, in order to transact that kind of business, to appoint an agent in California upon whom service could be made. The facts in this case show that the appellee sold its machinery, and delivered it in the state of Illinois. It was not engaged in conducting any branch of its business in the state of California. Legal service of process upon a corporation which will give a court jurisdiction of it can be made only in the state where it resides by the law of its creation, or in a state in which it is actually doing business at the time of service, in the manner prescribed by the statutes of that state or of the United States. (The question as to what kind of business by a foreign corporation within a state will justify a finding that it is engaged in business therein, and validate a service upon its agent, has been very thoroughly and elaborately discussed in the circuit and supreme courts of the United States, and the general consensus of opinion is, that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not a carrying on or doing business within the state"; *Doe v. Springfield etc. Mfg. Co.*, 44 C. C. A. 128, 104 Fed. 634.)

h. **Ceasing to do Business Within a State.**—As a foreign corporation does not become subject to the jurisdiction of the courts of a

state until it commences doing business therein, upon the same principle it ceases to be so subject, when it ceases to do such business. It is true that a state court determined that it continued to have jurisdiction of a foreign corporation after it had entirely discontinued business therein, but this corporation, while technically foreign, had had for a majority of its stockholders citizens therein, had not in fact done business in the state in which it was created, but, on the contrary, so long as it did business at all, transacted it and kept its principal office and held its meetings in the state wherein it was sued: *National Bank v. Southern P. M. Co.*, 55 Ga. 36.

Though there may be much difficulty in deciding whether a foreign corporation has ceased to do business within a state, there is no doubt that, after it has so ceased, the courts of the state are no more entitled to exercise jurisdiction over it than if it had never done business therein: *Eureka M. Co. v. California Ins. Co.*, 130 Cal. 153, 62 Pac. 898; *Friedman v. Empire etc. Ins. Co.*, 101 Fed. 535; *Swann v. Mutual etc. Assn.*, 100 Fed. 922. If a foreign insurance company, after doing business within a state, merely withdraws its agents therefrom and ceases to obtain or ask for new risks or to issue new policies, but continues its old policies in force, and collects the premiums thereon regularly, and pays losses, it has not ceased to do business within the state, and is therefore still there subject to suit and service of process upon a policy of insurance issued therein: *Connecticut Mut. Life. Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. Rep. 308.

III. Jurisdiction of the National Courts.

a. *Right of Corporation as a Citizen of the State Creating it.*—The doctrine that a corporation is a citizen of the state creating it and cannot become a citizen of any other is applicable for the purpose of determining the jurisdiction of the national courts, when it is based upon the citizenship of the parties, or of one of them: *Bank of United States v. Devereaux*, 5 Cranch, 61; *Marshall v. Baltimore etc. R. R. Co.*, 16 How. 314; *Lafayette Ins. Co. v. French*, 18 How. 404; *National T. Co. v. New York T. Co.*, 44 Fed. 711; *Myers v. Murray etc. Co.*, 43 Fed. 695. The various states are without power to modify this rule or to prevent its application, and cannot, therefore, deny the right to foreign corporations doing business therein or otherwise subject to their jurisdiction to sue or be sued in the national courts, or to remove there suits brought against them in the state courts: *Hyde v. Stone*, 20 How. 170; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. Rep. 528.

The provision of the act of Congress of March 3, 1887, as corrected by an act of August 3, 1888, declaring that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof

he is an inhabitant, but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant," prevents suit in the national courts against a corporation, except in the state of its creation, though it may be doing business in another state, unless the parties are residents of different states and the jurisdiction may be sustained on that ground, in which event the plaintiff is not at liberty to sue the defendant corporation in any courts of the United States, except in the district of which plaintiff is a resident: *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. Rep. 985; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. Rep. 44.

b. **Corporations of Foreign Countries.**—If a corporation has been created under the laws of some foreign nation, it can neither be a citizen of the United States nor resident in any part thereof. The provision of the statute just quoted cannot, therefore, be applicable to such corporations. On the contrary, the restrictive words of the statute apply "to those persons and those persons only who are inhabitants of some district within the United States. Their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the earlier part of the same section, and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole." The result is, that an action may be brought against an alien corporation in the national courts of the United States in any district thereof in which may be found some officer or agent of the defendant corporation upon whom, from his relation thereto, process may be served: *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. Rep. 221; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. Rep. 526.

c. **Citizenship in Two or More States.**—A corporation may, for some purposes, at least, be a citizen of two or more states, but this result can be produced only by adequate legislative enactments in the several states, and not by any act on the part of the corporation. It may do business in a state other than that of its creation, and may appoint agents there, upon whom process may be served, and may thereby authorize the courts of the state to exercise jurisdiction over it, but all this neither makes it a citizen nor an inhabitant of that state: *Hollingworth v. Southern Ry. Co.*, 86 Fed. 353; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. Rep. 44; *St. Louis etc. Ry. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. Rep. 621; *St. Joseph etc. Co. v. Steele*, 167 U. S. 659, 17 Sup. Ct. Rep. 925; nor deprives it of its right as a citizen of the state of its creation, to be

sued in the national courts, or to remove there suits brought against it elsewhere. The most complete union of interests of two or more corporations does not extinguish the identity of either, and each retains its existence and its standing in the courts only by virtue of the legislation of the state by which it was created, and a union of name, of officers, of business, and of property, cannot change the distinctive character of the separate corporations: *Nashua etc. R. R. Corp. v. Boston etc. Corp.*, 136 U. S. 356, 10 Sup. Ct. Rep. 1004.

There may be a consolidation of two or more corporations created in different states when such consolidation is authorized by law, in which event the consolidated corporation must, to some extent, for the purposes of jurisdiction, be regarded as a citizen of each of the several states under whose laws the original corporations were created. The result is, that if a resident of either state therein sues the consolidated corporation, both must be regarded as citizens of the state for the purposes of the suit; but if a nonresident brings a suit against the corporation, the parties must be regarded as citizens of different states, although the state of the plaintiff's residence is also one in which the corporation has been consolidated, and, if he sued it there, both he and it must there be regarded as citizens of the same state: *Muller v. Dowa*, 94 U. S. 444; *Railway Co. v. Whitton*, 13 Wall. 270; *Willamson v. Krohn*, 31 U. S. App. 325, 68 Fed. 655; *Baldwin v. Chicago etc. Ry. Co.*, 86 Fed. 167; *Missouri etc. Co. v. Meek*, 82 U. S. App. 691, 69 Fed. 753. Practically the same consequences ensue when a corporation is chartered in two or more states: *Phinizy v. Augusta etc. Co.*, 56 Fed. 273; *Western etc. R. Co. v. Robertson*, 22 U. S. App. 187, 61 Fed. 592.

d. **Right of Foreign Corporation to be Sued Only in the District of Which It is an Inhabitant.**—Unless a corporation has done something to waive its right to have jurisdiction over it so restricted, it cannot be sued in the national courts in a district other than that of which it is a citizen and inhabitant, though some officer or other representative may be found therein upon whom service of process may be made: *Maxwell v. Atchison etc. Ry. Co.*, 84 Fed. 288; *Hazeltine v. Mississippi etc. Ins. Co.*, 55 Fed. 745; *Averill v. Southern Ry. Co.*, 75 Fed. 736; *Rowbotham v. Geo. P. Steele Iron Co.*, 71 Fed. 758; *Myers v. Dorr*, 13 Blatchf. 23, Fed. Cas. No. 9988; *Main v. Second Nat. Bank*, 6 Biss. 26, Fed. Cas. No. 8976; *Fitzgerald etc. Co. v. Fitzgerald*, 137 U. S. 106, 11 Sup. Ct. Rep. 86. If, however, it appoints an agent elsewhere, consenting that process may be there served upon him, or, if, without such appointment, it does business outside of the district where otherwise it could alone be sued, there is no doubt that residents there entitled to sue may do so in the national courts there, though they are not courts of the district in which the defendant corporation was in the first instance entitled to be sued: *Gilbert v. New Zealand Ins. Co.*, 49 Fed. 884; *Shainwald v. Davids*, 69 Fed. 705; *Brownell v. Troy etc. R. R. Co.*, 18 Blatchf.

244, 8 Fed. 761; *Moch v. Virginia etc. Ins. Co.*, 4 Hughes, 115, 10 Fed. 696; *Robinson v. National Stock Yards Co.*, 20 Blatchf. 514; 12 Fed. 361; *Ex parte Schollenberger*, 98 U. S. 369; *Barrow S. S. Co. v. Kane*, 170 U. S. 108, 18 Sup. Ct. Rep. 526.

e. Right to Remove Suits to the National Courts.—A foreign corporation sued in a court of a state of which it is not a citizen has the same right to remove the cause to the national courts as any other nonresident: *Railroad Co. v. Koontz*, 104 U. S. 5; *Martin v. Baltimore etc. Ry. Co.*, 151 U. S. 673, 14 Sup. Ct. Rep. 533; *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. Rep. 981. Of this right it cannot be deprived by the state in which it is sued, either by the enactment of its legislature: *Rece v. Newport News etc. Co.*, 32 W. Va. 164, 9 S. E. 212; *Metropolitan L. I. Co. v. Harper*, 3 Hughes, 260, Fed. Cas. No. 9505; or by any stipulation exacted of the foreign corporation in pursuance of such enactment, to the effect that it will, if permitted to do business within the state, waive such right of removal: *Commonwealth v. East Tennessee Coal Co.*, 97 Ky. 243, 20 S. W. 610; *Baltimore etc. R. R. Co. v. Cary*, 28 Ohio St. 208; *Insurance Co. v. Morse*, 20 Wall. 445; *Barron v. Burnside*, 121 U. S. 197, 7 Sup. Ct. Rep. 935; *Southern Pac. Co. v. Denton*, 146 U. S. 207, 13 Sup. Ct. Rep. 46; *Bigelow v. Nickerson*, 70 Fed. 121.

IV. Of the Causes of Action of Which Jurisdiction may be Entertained.

a. Causes Arising Beyond the State, or Existing in Favor of Nonresidents.—If a corporation is a nonresident, no action upon the part of the state can change this fact, nor, without some concurrent or additional action on the part of the corporation, subject it to the jurisdiction of the state courts. That jurisdiction, as to its subject matter, is to be determined by the constitution and laws of the state, and is neither enlarged nor diminished by the circumstance that the person proceeded against is a nonresident, whether natural or artificial. There are many decisions holding that the courts of a state have not jurisdiction to proceed against a foreign corporation where the plaintiff is a nonresident: *Fairfax etc. Co. v. Chambers*, 75 Md. 604, 23 Atl. 1024; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625; *Sawyer v. North American L. I. Co.*, 46 Vt. 697; or the cause of action did not arise within the state: *Central R. R. etc. Co. v. Carr*, 76 Ala. 388, 52 Am. Rep. 339; *Grand Trunk Ry. Co. v. Wayne Circuit Judge*, 106 Mich. 248, 64 N. W. 17; *Strom v. Montana O. R. Co.*, 81 Minn. 346, 84 N. W. 46; *Rodgers v. Mutual etc. Assn.*, 17 S. C. 406; *Peters v. Neely*, 84 Tenn. 275. These and many other decisions of like purport, which might be cited, are doubtless correct interpretations of the statutes of the several states under which they were made. Each state may be regarded as at liberty to withhold, so far as its courts are concerned, redress against foreign corporations, in whole or in part, or, what amounts

to the same thing, to extend such redress only to those cases in which it deems its citizens to be most affected. Hence the policy which has extensively prevailed, of requiring nonresidents to resort to the courts of the domicile of foreign corporations for redress, and especially when the transaction for which redress is sought did not occur within the boundaries of the state in whose courts some action is sought to be maintained, but we shall hereafter show that each state may exercise jurisdiction without imposing any limits having reference to the place where the cause of action arose, or the residence of the plaintiff seeking to assert it.

b. Includes all Transitory Causes of Action.—A state or nation may, even as against a foreign corporation, give its courts jurisdiction over transitory causes of action, irrespective of the place where they arose, or the person in whose favor they accrued, whether resident or nonresident, citizen or alien. The question of jurisdiction is not dependent on the cause of action arising within the state or nation in whose courts redress is sought, nor upon the plaintiff's being a citizen or resident thereof, unless, indeed, some statute makes that question material and controlling. Therefore, if a foreign corporation has placed itself in a position where process issued by the courts of a state or nation can be lawfully served upon it, and such service is made within the territorial limits of the state or nation, its courts are competent to proceed, though the cause of action did not arise within its limits, unless its constitution or statutes prohibit, or, at least, do not sustain, such proceeding. Process having been regularly served upon a foreign corporation, it cannot, any more than when the defendant is a nonresident natural person, defeat the action on the ground either that the plaintiff is a nonresident, or that his cause of action depends on a transaction occurring in another state or country; and this rule is equally applicable whether the action is for a tort committed, or a contract entered into, beyond the jurisdiction: *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 78 Am. St. Rep. 390, 27 South. 851; *Johnston v. Trade Ins. Co.*, 132 Mass. 432; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 South. 53; *Peters v. Neely*, 84 Tenn. 275; *Mutual Life Ins. Co. v. Nichols* (Tex. Civ. App.), 24 S. W. 910; *United States v. Southern Pac. Ry. Co.*, 49 Fed. 297; *Gilbert v. New Zealand Ins. Co.*, 49 Fed. 884; *Denver etc. R. R. Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738; *Railroad Co. v. Harris*, 12 Wall. 65. This may be regarded as finally settled by the decision in *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. Rep. 526. This was an action in the circuit court of the United States, for the southern district of New York, against the Barrow Steamship Company, Limited, a corporation, organized under the laws of Great Britain, to recover for assault committed on the plaintiff in Londonderry, Ireland, when he was a passenger on defendant's steamship "Devonia." The defendant was represented in New York by general agents on whom the

process issued in the action was served. At various stages of the proceeding, the defendant moved for a dismissal of the action for want of jurisdiction of the subject matter thereof and of the person of the defendant. The motion was denied, and the trial subsequently had resulted in a verdict in favor of the plaintiff. We have already referred to one proposition established by this case, which is, that it was not material that the statutes of New York did not provide any special method for the service of such process. Upon the other question the court said: "By the existing act of Congress, defining the general jurisdiction of the circuit courts of the United States, those courts 'shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars,' 'in which there shall be a controversy between citizens of different states,' 'or a controversy between citizens of a state and foreign states, citizens, or subjects'; and, as has been adjudged by this court, the subsequent provisions of the act, as to the district in which suits must be brought, have no application to a suit against an alien or a foreign corporation; but such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant: Act of March 3, 1887, c. 373, sec. 1, as corrected by act of August 13, 1888, c. 866, sec. 1; 24 Stats. 552; 25 Stats. 434; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 453, 12 Sup. Ct. Rep. 935; *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. Rep. 221; *Galveston etc. Ry. Co. v. Gonzales*, 151 U. S. 496, 508, 14 Sup. Ct. Rep. 401; *In re Keasbey etc. Co.*, 160 U. S. 221, 229, 230, 16 Sup. Ct. Rep. 273. The present action was brought by a citizen and resident of the state of New Jersey, in a circuit court of the United States, held within the state of New York, against a foreign corporation, doing business in the latter state. It was for a personal tort committed abroad, such as would have been actionable if committed in the state of New York or elsewhere in this country, and an action for which might be maintained in any circuit court which acquired jurisdiction of the defendant: *Railroad Co. v. Harris*, 12 Wall. 65; *Dennick v. Railroad Co.*, 103 U. S. 11; *Huntington v. Attrill*, 146 U. S. 657, 670, 675, 13 Sup. Ct. Rep. 224; *Stewart v. Baltimore etc. R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. Rep. 105. The summons was duly served upon the legally appointed agents of the corporation in New York: *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. Rep. 221. The action was within the general jurisdiction conferred by Congress upon circuit courts of the United States. The fact that the legislature of the state of New York has not seen fit to authorize like suits to be brought in its own courts by citizens and residents of other states cannot deprive such citizens of their right to invoke the jurisdiction of the national courts under the constitution and laws of the United States. The necessary conclusion is, that the

circuit court had jurisdiction to try the action and render judgment therein against the defendant.

c. **Suits in Equity.**—Very rarely have actions been sustained against foreign corporations, except for the recovery of a sum of money due under a contract, express or implied, or to which the plaintiff was entitled as compensation for some injury to his person or property, but the jurisdiction of the courts is not restricted to proceedings of this class. We know of no restriction which is not equally applicable to nonresidents than to persons who have been served with process within the state. The jurisdiction extends to suits in equity: *Wilson v. Martin-Wilson etc. Co.*, 149 Mass. 24, 20 N. E. 318; *Peters v. Neely*, 84 Tenn. 275; and will not be declined on the sole ground that the corporation defendant may refuse to comply with the decree, and the court may be without any adequate means of enforcing it: *Wilson v. Martin-Wilson etc. Co.*, 149 Mass. 24, 20 N. E. 318.

d. **Proceedings in Rem.**—The general statement heretofore made that foreign corporations are subject to the jurisdiction of the courts to the same extent as nonresident natural persons applies also to cases where process cannot be personally served within the state. Thus, for the purpose of affecting property within the state by creating and enforcing liens thereon, or determining conflicting claims of title thereto, or making partition thereof, its courts cannot be prevented from acting by the fact that the person to be proceeded against is not within the state. Its legislature may provide for the service of process by publication, or in some other mode adapted to give notice, and may thereon proceed to final judgment and enforce liens against property, or determine conflicting claims of title thereto, or make partition thereof, or grant any other appropriate remedy, the effect of which does not extend to creating an obligation in personam against the defendant: *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; note to *Alley v. Caspari*, 6 Am. St. Rep. 181; *Molyneux v. Seymour etc. Co.*, 30 Ga. 440, 76 Am. Dec. 662; *Harris v. Palmore*, 74 Ga. 273; *Dahlonga G. M. Co. v. Purdy*, 65 Ga. 496; *Quarl v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; *Venable v. Dutch*, 37 Kan. 515, 1 Am. St. Rep. 260, 15 Pac. 520; *Young v. Upshur*, 42 La. Ann. 362, 21 Am. St. Rep. 381, 7 South. 557. We do not doubt that a foreign corporation may be proceeded against as a nonresident on whom process cannot be personally served within the state, and that a judgment may be rendered against it having the same effect in rem as if it were a nonresident natural person, on whom process was served in the same manner.

e. **Proceedings by Attachment and Garnishment.**—The most familiar instance of proceedings against nonresidents for the purpose of obtaining judgments, which may be satisfied out of their property

within the state, though they are not personally served with process therein, is that of attachments in which property is levied upon by some officer, and a lien thereby created against it for the purpose of satisfying any judgment which may be afterward given in the action, and there is no doubt that the property of a corporation within a state, whether foreign or domestic, is subject to attachment to the same extent as the property of a natural person.

By proceedings in attachment rights may be created or judgments authorized against persons not parties to the original action, as where, by garnishment or trustee process, a third person is made liable to pay to the plaintiff a debt owing to the defendant. Foreign corporations are subject to garnishment or trustee process to the same extent as natural persons, and the only question here worthy of special consideration is whether they are so subject when the person to whom they owe the debt is not a resident, nor within the state where the garnishment is made. Probably the weight of authority is now in favor of the proposition that a corporation does not, by appointing an agent or doing business in another state, become subject to garnishment there on account of debts owing by it to residents of states other than that in which the process of garnishment is served: *National Bank v. Furtick*, 2 Marv. (Del.) 85, 69 Am. St. Rep. 99, and note, p. 122, 42 Atl. 479; *Central of Georgia Ry. Co. v. Brinson*, 109 Ga. 354, 77 Am. St. Rep. 382, 34 S. E. 597; *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 383, 71 Am. St. Rep. 492, 75 N. W. 740; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448, 33 N. E. 938, *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849, 40 Am. St. Rep. 522, 56 N. W. 711; *Morawetz v. Sun Ins. Office*, 96 Wis. 175, 65 Am. St. Rep. 43, 71 N. W. 882. These decisions are usually placed on the ground that the situs of a debt must be either at the domicile of the creditor or of the debtor, and hence that there can be no garnishment where neither the corporation nor its creditor is domiciled in the state. There is, however, a growing tendency to doubt whether a debt has any domicile, or, at all events, not to regard its domicile as material for the purposes of garnishment, and hence to sustain garnishments when made in the mode prescribed by the local statutes, irrespective of the residence, either of the person owing the debt, the person to whom it is due, or the person served with process of garnishment, and hence to sustain the garnishment of a foreign corporation, though the person to whom the debt is owing is not a resident of the state: *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 56 Am. St. Rep. 275, 46 N. E. 631; *German Bank v. American Fire Ins. Co.*, 83 Iowa, 491, 32 Am. St. Rep. 316, 50 N. W. 53; *Howland v. Chicago etc. Ry. Co.*, 134 Mo. 474, 36 S. W. 29.

V. Of the Discretion of Courts to Refuse to Exercise Jurisdiction.

Though jurisdiction in the courts of a state exists in the sense that if they proceed to exercise it their judgments must be re-

garded as valid, still they may, in some cases, decline to act, as where the parties to the action are both citizens of a foreign country, to which they intend to return, and where they may have their controversy determined in the courts of their domicile: *Kingartner v. Illinois Steel Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, and note, p. 870, 68 N. W. 664; or where the rights of the parties depend upon the laws of a foreign country, which the courts of this state must have great difficulty in determining: *Mexican etc. Ry. Co. v. Jackson*, 89 Tex. 107, 59 Am. St. Rep. 28, 33 S. W. 857. If, on the other hand, the parties, instead of being residents of different countries, are citizens of different states, there is doubt of the power of the state court to proceed to enforce a transitory cause of action, though it arose in another state and must, to some extent, involve the construction of its laws: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. Rep. 67, 20 N. E. 287; *Burdick v. Missouri etc. Ry. Co.*, 123 Mo. 221, 45 Am. St. Rep. 528, 27 S. W. 453; *Morris v. Missouri etc. Ry. Co.*, 78 Tex. 17, 22 Am. St. Rep. 17, 14 S. W. 228, and it has been held that the courts of a state, when the parties are not aliens, have no right to decline jurisdiction, though defendant is a corporation of another state: *Kingartner v. Illinois Steel Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, and note, p. 873, 68 N. W. 664, *Cofrode v. Gartner Circuit Judge*, 79 Mich. 332, 44 N. W. 623. This question has not, so far as we are aware, been determined by the national courts, and in some of the states statutes are in existence, and are accorded consideration, which, in express terms, declare that an action against a corporation, created in another state may be brought only when the cause arose, or the subject matter of the action is situated, within the state: *Robinson v. Ocean etc. Co.*, 112 N. Y. 815, 19 N. E. 625. It has further been held that courts of a state will not entertain jurisdiction of an action against a corporation of another state, if the adjudication, which might be made, must depend for its enforcement upon the courts of the other state, and they may find that the courts of this state mistook the laws of the other state: *Kimball v. St. Louis etc. Ry. Co.*, 157 Mass. 7, 34 Am. St. Rep. 250, 31 N. E. 697.

VI. Mode of Serving Process.

a. *Designating by Contract.*—The mode of serving process on a foreign corporation is usually prescribed by statute, and perhaps must be so prescribed, as it may be that, in the absence of a statute expressly controlling the question, there can be no such service that a corporation is bound to respect, and which will of itself give jurisdiction to any court. In England, however, it has been decided that a foreign corporation may itself, by contract, provide not only that it may be sued and served with process, though not otherwise subject thereto, but may also designate the agent,

officer, or other person on whom the service may be made: *Thar-sis C. Co. v. Societe des Metaux*, 60 L. J. Q. B. Div., N. S., 924.

In many of the states, foreign corporations may, to some extent, be regarded as having impliedly contracted as to the mode of serving process on them, the persons on whom it may be made, and the general consequences of the service, as where a state statute declares that no corporation, other than domestic, shall do business therein without first designating that process against it may be served, or, in the absence of such designation, that process may be served upon some public officer specified in the statute. Where such a statute prevails, service in accordance with its provisions is, doubtless, sufficient to give the courts jurisdiction in personam over the corporation, whether the service be regarded as supported by the actual or implied stipulation of the defendant, or only by the provisions of the statute authorizing it.

b. Power of the States to Prescribe How and on Whom Process may be Served.—It is difficult, if not impossible, to describe any well-defined limits to the power of the state to prescribe either the mode in which process may be served on a foreign corporation or the officer, agent, or other representative upon whom it can be made. It is quite safe to affirm that any mode of service may be authorized which would be valid as against a domestic corporation: *Pope v. Terre Haute C. M. Co.*, 87 N. Y. 137. Of course, the object of all process and of its service is to inform the person, natural or artificial, of the proceeding against him, of the court in which it is pending, and that he must, within some time designated, either by law or in the process, appear and make some defense, or that otherwise some judgment or order may be entered against him. Any method of service not calculated to give the defendant notice of any of these essential facts may well be regarded as beyond the power of the state to authorize, whether the defendant be a natural or artificial person, a resident or a nonresident. In a comparatively recent case the constitutionality of a statute was questioned which purported to authorize service upon a defendant corporation "by delivering to, and leaving with, the registrar of deeds" true copies of the summons and complaint. The statute was assailed, the defendant being a domestic corporation, as authorizing a proceeding without "due process of law." The court quoted with approval the language of Mr. Justice Curtis, in *Murray v. Land Co.*, 18 How. 276, that "it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will"; and also the language of Mr. Justice Field in *Hagar v. Reclamation Dist.*, 111 U. S. 708, 4 Sup. Ct. Rep. 663, that "it is sufficient to observe here that by

'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law. It must be adapted to the end to be attained. And wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard, respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property, which may result in the deprivation of either, without the observance of those general rules established by our system of jurisprudence for the security of private rights"; and, finally, speaking for itself, the court said that "the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity for being heard and making a defense before the determination. Such service was not secured 'by delivering to and leaving with the register of deeds true copies' of the summons and complaint, as prescribed by the portion of the statute quoted. On the contrary, such service, if held to be effectual, would be well calculated to conceal from the officers and agents of the corporation the fact that such an action had been commenced. True, the register is a public officer, with duties prescribed by statute, but he is in no sense the agent or representative of 'private corporations incorporated or organized under any law of this state.' Such corporations are supposed to be clothed with authority to select and appoint their own officers and agents. We must hold the clause of the statute in question to be unconstitutional and void": *Pinney v. Providence etc. Co.*, 106 Wis. 896, 80 Am. St. Rep. 41, 82 N. W. 808. These principles are doubtless applicable to foreign corporations. Thus, while in *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. Rep. 308, the service there assailed was sustained, the court said: "If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable, and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference as to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient." Acting upon this principle, the supreme court of New Jersey refused to sustain service of process on an engineer of a vessel owned by the defendant, it being a foreign corporation, and the statute of the state expressly purporting to authorize process to be served upon any officer, director, agent, clerk, or engineer of the corporation. The court said: "In its designation of the classes of persons on whom process against foreign corporations may be served, our statute must be construed in the light of the constitutional principle, that only by due process of law can courts acquire jurisdiction over

parties; and therefore, when it refers to agents, clerks, and engineers—persons whose relation to a corporation may give them no representative character whatever, in regard to the litigation contemplated—the court must confine those general terms in such a way as will uphold the jurisdiction which they are asked to exercise. In this case the engineer of the Maryland was only a subordinate employé of the defendant, having no general charge over its corporate concerns; nor had he such connection with the business out of which the cause of action arose as might fairly support an inference that he had authority to represent the corporation in the matter now before us”: *Carroll v. New York etc. Ry. Co.* (N. J., June, 1900), 46 Atl. 708. Views substantially identical were expressed by the supreme court of Minnesota in *Mikolas v. Walker*, 73 Minn. 305, 76 N. W. 36, in the following language: “The statute does not define the word ‘agent,’ but as the service of process goes to the jurisdiction of the court over the person, it must be construed so as to conform to the principles of natural justice, and so that the service will constitute ‘due process of law.’ To do this, the agent must be one having in fact a representative capacity and derivative authority. Such agent must be one actually appointed and representing the corporation as a matter of fact, and not one created by construction or implication, contrary to the intention of the parties.”

c. Power of the States to Provide for Service on any Agent or Employe.—It is, perhaps, within the power of the legislature to authorize service against a foreign corporation doing business within the state to be made upon any agent or even upon any employé thereof, however subordinate his rank or limited his authority: *McNichol v. United States M. R. Agency*, 74 Mo. 457; *Weymouth v. Washington etc. R. Co.*, 1 McAr. 19; or even upon a person in charge of the property of the corporation. “Conceding human motives their usual play, such service is likely to result in actual notice to persons whose rights may be affected by such methods and modes of procedure. Such laws are based on the assumption that men will be prompt to protect their own interests, and diligent in the discharge of their duties to those who have reposed confidence in them”: *Saunders v. Sioux City etc. Co.*, 6 Utah, 431, 24 Pac. 532.

d. Service Where the Corporation Failed to Designate an Agent.—If the statute provides that a corporation shall, as a condition precedent to doing business in the state, file therein a consent, in writing, that process may be served upon some designated agent or some public officer, but it proceeds to do such business without complying with such condition precedent, the question is then presented, whether and upon whom process against it may be served. There is no doubt that if the managing agent is found

within the state, service of process may be made on him, for it is not within the power of the corporation, either by its action or nonaction, to do business in the state, without exposing itself to liability to service of process on it therein: *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534; *Foster v. Charles Betcher Lumber Co.*, 5 S. Dak. 57, 49 Am. St. Rep. 859, 58 N. W. 9. It does not, however, necessarily follow that in the absence of the filing of the consent, which it should have filed, authority is given to serve process on a public officer, who is not an agent of the corporation, though had the corporation complied with the condition precedent, he must have been designated by it as the person upon whom service of process against it might be made. In construing precisely the same statute, courts of two of the states have come to diverse conclusions, the one being, that, by doing business in the state, the corporation necessarily submitted to the service of process against it upon the officer whom it must have designated had any designation been made: *Masons' etc. Assn. v. Riley*, 60 Ark. 578, 31 S. W. 148; and the other, that by failing to comply with the statute, the corporation merely subjected itself to the penalties and consequences therein enumerated, but not that service of process be made on the public officer, the statute not having expressly declared that to be one of the consequences of the failure to comply therewith: *Rothrock v. Dwelling House Ins. Co.*, 161 Mass. 423, 42 Am. St. Rep. 418, 37 N. E. 206.

e. **Managing Agents on Whom Process may be Served.**—Unless the statute, designating the person on whom service may be made against a foreign corporation, may be successfully assailed on the ground of not affording due process of law, it is manifest that the only question remaining to be considered is whether the person upon whom service was made is one of the persons or class of persons prescribed by statute. Nearly all statutes upon the subject authorize service to be made upon the president, secretary, cashier, or other principal officers of the corporation, and, where service is made upon one, on the ground that he is one of such principal officers, the only inquiry necessarily is, whether such is the fact. The chief difficulty arises when the statute attempts to describe particular classes of persons, and the inquiry must be as to whether the person served is a member of that class. One of these general designations includes "managing agents." There can, of course, be no doubt of the authority of the legislature of each state to authorize service on the managing agent of a foreign corporation, if it is doing business therein: *Cunningham v. Southern Express Co.*, 67 N. C. 425.

There is always a tendency on the part of courts to sustain their jurisdiction when assailed, and hence it is not surprising that they have held persons to be managing agents, within the meaning of the statutes here under consideration, when their duties and au-

thority would be more accurately described by the term "agent," or even of "special agent." There can be no doubt that one having full charge of the business of the corporation which he represents, and who is not subject to the authority of any other agent within the state, is a managing agent: *Porter v. Chicago etc. Ry. Co.*, 1 Neb. 14; *Foster v. Charles Betcher Lumber Co.*, 5 S. Dak. 58, 49 Am. St. Rep. 859, 58 N. W. 9; and it has sometimes been said that the distinction between a managing and an ordinary agent is, that the agency of the one extends to all transactions of the corporation, and, of the other, to the management of a particular branch or department: *Brewster v. Michigan Cent. R. R. Co.*, 5 How. Pr. 183. Judge Thompson says: "The later and better view is that an agent is deemed to be a managing agent, within the meaning of the statutes, where he carries on within the domestic jurisdiction an essential portion of the business of a foreign corporation—such, for instance, as the superintending of a factory, maintained by a foreign corporation, within the domestic jurisdiction": *Thompson on Corporations*, sec. 8037; *Foster v. Charles Betcher Lumber Co.*, 5 S. Dak. 57, 49 Am. St. Rep. 859, 58 N. W. 9; *Hat-Sweat Mfg. Co. v. Davis S. M. Co.*, 31 Fed. 294. The court of appeals of New York said: "A managing agent must be some person invested with general powers, involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it": *Taylor v. Granite S. P. Assn.*, 136 N. Y. 343, 32 Am. St. Rep. 749, 32 N. E. 992. The following have been held to be managing agents: One designated in the circulars of a corporation as its general managing agent, and who has charge of the correspondence and business matters, relating to the carriage of passengers, though he has nothing to do with the freight department: *Tuchband v. Chicago etc. R. R. Co.*, 115 N. Y. 437, 22 N. E. 361; the financial agents of a corporation, maintaining an office for the transaction of its monetary and financial business in the state, there being therein no superior or other officer upon whom process could be served: *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. Rep. 221; an agent of a railway corporation, maintaining an office, designated by a sign as the freight and passenger office of the road, and soliciting passengers and freight to go thereover, and issuing bills of lading for freight so shipped: *Denver etc. R. Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738; one having full charge of the business of a foreign corporation dealing in lumber and merchandise at a particular place in the state, and subject to no authority from any other person or agent therein, and who corresponds with, accounts to, and receives instructions from, the main office of such corporation in a foreign state, receives and disburses money, pays accounts, makes con-

tracts, with customers, as to terms of payment, issues receipts for money, employs all necessary assistants, and advertises himself as manager: *Foster v. Charles Betcher Lumber Co.*, 5 S. Dak. 57, 49 Am. St. Rep. 859, 58 N. W. 9; *Hat-Sweat Mfg. Co. v. Davis S. M. Co.*, 81 Fed. 294; an agent of a foreign newspaper corporation occupying an office under the sign of his principal, referred to as its "eastern representative," and who for it solicited and obtained advertisements and made contracts therefor at a prescribed schedule of rates, and when rates were submitted outside of the schedule rates, under the duty of submitting the proposition to his principal, there being no other agent in the state of superior authority: *Palmer v. Chicago Evening Post Co.*, 85 Hun, 403, 82 N. Y. Supp. 992; *Palmer v. Chicago Herald Co.*, 70 Fed. 886; *Brewer v. Knapp*, 82 Fed. 694; *Union Associated Press v. Times-Star Co.*, 84 Fed. 419; one having charge of the factory of a foreign corporation within the state, and dividing with it the profits of the business: *Hat-Sweat Mfg. Co. v. Davis Sewing Machine Co.*, 81 Fed. 294; one who, though an officer of another corporation, acts for the foreign corporation in question, by soliciting and obtaining freight and passenger business: *Norton v. Atchinson etc. Ry. Co.*, 61 Fed. 618; a local agent keeping an office, and having charge of all the business of an express company, at a particular city, though there was a superior officer known as the general superintendent residing and maintaining an office in another city in the same state: *American Express Co. v. Johnson*, 17 Ohio St. 641.

The following, on the other hand, have been held not to be managing agents: A licensee of a foreign telephone company paying an established sum per month for franchises used by it: *United States v. American Bell Tel. Co.*, 29 Fed. 17; a captain of a steamboat belonging to a foreign corporation and transacting business on the waters of the state: *Upper Mississippi T. Co. v. Whittaker*, 16 Wis. 220; an attorney of a foreign corporation, whose only duties had been the representing it as attorney at law in a suit to foreclose a mortgage, and, perhaps, in some other legal proceedings: *Taylor v. Granite S. P. Assn.*, 136 N. Y. 843, 32 Am. St. Rep. 749, 32 N. H. 992.

The tendency in the state of New York is to solve doubts against the authority of one who has claimed to be a managing agent. It was, therefore, there held that service upon one claimed to be a "representative" of a bridge company, and who, as such, visited the city of New York for the purpose of negotiating the sale of its bonds, issued by his principal, could not be sustained on the ground that he was managing agent. "His relation to the company," said the court, "as its representative in the city of Chicago may very possibly have been of a restricted nature. Nor would it do, in a case of such gravity as the maintenance of an action against a foreign corporation, to rely either upon the alleged

statements of the person served, as here, or upon what he may have been described in the city directory of the city of Chicago. It is not necessary that the office of the person to whom the summons is delivered, in a suit against a foreign corporation should be precisely described as that of a 'managing agent,' because, as we think, from the language of section 432 of the Code of Civil Procedure, it was intended that any person holding some responsible or representative relation to the company, such as the term 'managing agent' would include, might be served with the summons. In the absence, therefore, of proof with respect to what the relation actually is to the foreign corporation of the person, to whom the summons is delivered in this state, it is the wiser and the better rule to adopt that the right to maintain the action has not been acquired": *Coler v. Pittsburgh Bridge Co.*, 146 N. Y. 281, 40 N. E. 779.

f. Agents on Whom Process may be Served.—If a statute purports to authorize service to be made upon any agent of a foreign corporation, doubt may arise whether the person on whom service has been made, though to some extent authorized to act for the corporation, is its agent, within the meaning of the law. The word is not synonymous with "employé," and hence there may be many persons in the employ of a foreign corporation who are not its agents in the sense of that term as employed in the statutes. Where a person has authority to contract for a corporation, he is certainly its agent, and when he has, for it, made a contract, out of which an action grows, there is a strong, and, we believe, irresistible tendency to maintain that he is its agent on whom process may be served, in the absence of any language in the statute requiring a more restricted construction of his authority: *Gross v. Nichols*, 72 Iowa, 239, 83 N. W. 653; *Brunson v. Nichols*, 72 Iowa, 763, 84 N. W. 289; *Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442, 17 Atl. 1079; *Abbeville Electric Light Co. v. Western Elec. Supply Co.*, 61 S. C. 361, ante, p. 890, 39 S. E. 559; *Estes v. Belford*, 22 Fed. 275. Perhaps in every instance in which a person has contracted for a corporation, he must be held to be its agent, and service of process on him for it sustained: *Memphis etc. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527; *Burgess v. Aultman & Co.*, 80 Wis. 292, 50 N. W. 175. On the other hand, the claim that one is an agent can rarely be maintained where his authority stops short of the power to contract, as where his duties are restricted to the collection of claims: *Moore v. Freeman Nat. Bank*, 92 N. C. 590; or receiving payment for advertisements to be published at rates fixed by the principal: *Mulhearn v. Press P. Co.*, 53 N. J. L. 150, 20 Atl. 760; or collecting and forwarding news: *Evansville Courier Co. v. United Press*, 74 Fed. 918; or soliciting business and giving information for a railway corporation, not including the right to sell tickets or make other contracts: *Fair-*

bank etc. Co. v. Cincinnati etc. Ry. Co., 4 C. C. A. 403, 54 Fed. 420; Wall v. Chesapeake etc. Ry. Co., 95 Fed. 398. Respecting drummers, some of the decisions affirm that they are agents of their principals: Ryerson v. Steere, 114 Mich. 352, 72 N. W. 131; and others that they are not: March-Davis Sewing Machine Co. v. Strobridge L. Co., 79 Ill. App. 683.

Foreign insurance and loan companies are represented in nearly every state by agents, who, strictly speaking, do not have power to contract for them, but who do, by their authority, solicit business, receive payments of money, and sign, or at least, deliver, receipts therefor, and who are generally treated by the persons with whom they come in contact for business purposes as representatives or agents of their principals. Out of the transactions which they negotiate and the varied acts done by them for the corporation much litigation arises, and the natural tendency of the courts of the states is to treat them as representing the corporation to an extent sufficient to justify the service of process on them, at least when no superior or more general agent or officer is accessible for that purpose. Thus, the statutes of Indiana and Wisconsin expressly include among the agents of foreign corporations all persons who solicit insurance for them, or transmit any application therefor, or receive any premium, or in any manner aid the doing of any business for them: Beyer v. Odd Fellows' F. A. Assn., 157 Mass. 367, 34 Am. St. Rep. 288, 32 N. H. 469; State v. Northwestern etc. Assn., 62 Wis. 174, 22 N. W. 135; State v. United States etc. Assn., 67 Wis. 624, 31 N. W. 229; Dixon v. Order of Railway Conductors, 49 Fed. 910. Practically the same result has been reached in other states without the aid of any statutes applying especially to corporations of this class, and hence the following have been adjudged to be agents on whom process might be served: The local or branch secretary of a mutual insurance company authorized to receive assessments from members within the state, countersign and deliver receipts therefor, and forward the money to the home office: Southwestern M. B. Assn. v. Swenson, 49 Kan. 449, 30 Pac. 405; Vorheis v. People's etc. Soc., 86 Mich. 31, 48 N. W. 1087. The same principle has been applied to an agent of a building and loan association who solicited business for it, directed its local affairs, receipted for and received installments, fines, and dues, and was paid a regular commission: Pollock v. Carolina etc. Assn., 48 S. C. 65, 59 Am. St. Rep. 695, 25 S. E. 977. The fact that a corporation had a general agent in the state is often regarded as material. His absence furnishes an additional reason for sustaining a service made on a minor or local agent, and his presence for declining to act upon such service: Weight v. Liverpool etc. Ins. Co., 80 La. Ann. 1186. The following, in addition to the persons already referred to, have been held to be agents of foreign corporations on whom process against them

might be served: Receivers appointed in another state and in possession and control of property of the corporation in the state where served: *Ganebin v. Phelan*, 5 Colo. 88; one acting as superintendent of construction of an electric light and street-car plant, and engaged in its repair, and having oversight of all the work and general charge of its affairs: *Clinard v. White*, 129 N. C. 250, 39 S. E. 960; one who, by the president of a corporation owning a slate quarry, was requested to attend to its affairs, and who looked after shipments of freight, received royalties, leased a house on the premises, sent statements to the corporation from time to time accounting for moneys received, and generally attended to its interests: *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534; a purser or wharfinger of a foreign steamship corporation entered at one of its docks: *Sievers v. Dallas etc. Nav. Co.*, 24 Wash. 302, 64 Pac. 539.

It has been said that an agent must be one appointed by the corporation, and not one created by construction or implication contrary to its intention: *Mikolas v. Walker*, 73 Minn. 305, 70 N. W. 36; *United States v. American Bell Tel. Co.*, 29 Fed. 17. We feel confident that this principle, if it prevails at all, must be accorded a restricted application. In truth, we cannot believe that the actual intent of the parties is material. From the relation which they in fact occupy toward each other, the court must draw the inference whether one is agent, and the principle, if ever material in reaching a conclusion, is certainly rarely or never controlling. Hence, if a corporation sanctions or acquiesces in a course of dealing or a false representation by one, from which others believe, and have a right to believe, that he is its agent, it may become estopped from disputing his agency, even on a motion to quash a service of process made upon him for it: *Italian-Swiss A. Colony v. Pease*, 194 Ill. 98, 62 N. E. 817, 96 Ill. App. 45.

g. **Service on Agents Whose Authority has Terminated.**—If it be true, as the decisions have affirmed, that the guaranty of due process of law is violated by any statute attempting to authorize service of process against a foreign corporation on any person who does not in fact represent it, or, at least, whose relations to it are not such as to render it probable that process served upon him will result in notice to it, then it must follow that, though one has had sufficient authority to represent a foreign corporation, yet if that authority has terminated, there must also have died with it the right to treat him as an agent of the corporation for the purpose of receiving service of process. Perhaps, in a majority of the cases where the agency has in fact ended, feelings of hostility have been engendered, the result of which is that service on the former agent may be less likely to give notice to the corporation than if made on a stranger.

If a statute requires a foreign corporation, before doing business, to appoint an agent upon whom service of process may be made, and it in fact makes such appointment, or if the statute authorizes service on an agent of the corporation who had conducted a specified transaction irrespective of the continuance of the agency, the service may be good, though the agency had ceased before it was made, provided the corporation had not appointed some other agent on whom process against it might be served: *Gillespie v. Commercial M. I. Co.*, 12 Gray, 201, 71 Am. Dec. 743; *Gibson v. Manufacturers' etc. Ins. Co.*, 144 Mass. 81, 10 N. E. 729; *Connecticut etc. Ins. Co. v. Duersen*, 28 Gratt. 630. If such were not the interpretation of the statutes, their purpose might be thwarted by a formal compliance and a subsequent withdrawal of the authority given.

Where, on the other hand, the right to service of process is not claimed on the ground of any special designation by the corporation of the person on whom service was made, and the service is sought to be sustained on the ground that he was an officer of the corporation, the question presented must, we think, be determined by inquiring whether he was such at the time the process was served, and not by his relation to the corporation at any other period, whether anterior or subsequent: *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737; though in one case the service was sustained on the ground that the plaintiff, when it was made, was ignorant of the termination of the agent's authority: *Ervin v. Oregon Steam Nav. Co.*, 22 Hun, 598; *Capen v. Pacific M. I. Co.*, 25 N. J. L. 67, 64 Am. Dec. 412.

h. The Mode of Service Prescribed by the Statute Must be Pursued.—Hence, the service of process upon a person not included in any of the classes of persons specified in the statute must be without effect upon the corporation, and therefore inadequate to support a judgment against it: *Union Guaranty etc. Co. v. Craddock*, 59 Ark. 593, 28 S. W. 424; *Sullivan v. La Crosse etc. M. Co.*, 10 Minn. 386; *Lonkey v. Keyes S. M. Co.*, 21 Nev. 312, 81 Pac. 57; *Continental W. P. Co. v. Voight etc. Co.*, 106 Fed. 550.

1. Cumulative Modes of Service.—There may, at the same time, be different modes of acquiring jurisdiction sanctioned by the same statute, and different persons upon whom the service of process may be made. One of such persons may generally "accept service of process": *Wilson v. Martin-Wilson etc. Co.*, 149 Mass. 24, 20 N. E. 818. So statutes requiring foreign corporation to designate some agent or attorney upon whom service of process may be made are usually construed as affording a cumulative remedy, and hence service of process may also be made upon any agent sufficiently representing the corporation, whether it has made such designation: *Lesser Cotton Co. v. Yates* (Ark., June, 1901), 63 S.

W. 997; *Moffitt v. Chicago Chronicle Co.*, 107 Iowa, 407, 78 N. W. 45; *Johnson v. Hanover etc. Co.*, 15 Fed. 97; *Mutual etc. Assn. v. Cleveland Woolen Mills*, 27 C. C. A. 212, 82 Fed. 508; *Henrietta etc. Co. v. Johnson*, 173 U. S. 221, 19 Sup. Ct. Rep. 402; or not: *Foster v. Charles Betcher Lumber Co.*, 5 S. Dak. 57, 49 Am. St. Rep. 859, 58 N. W. 9. In a few of the states it has been held that their statutes respecting foreign insurance corporations, in so far as they have provided for the permission of such corporations to do business within the state and filing a designation of some agent upon whom process against them may be served, operate as a repeal of the pre-existing statutory provisions authorizing service on other agents, and hence that no service is effective if made on an agent other than the one so designated: *Rehm v. German etc. Inst.*, 125 Ind. 135, 25 N. E. 173; *Oland v. Agricultural Ins. Co.*, 69 Md. 248, 14 Atl. 669; *Baile v. Equitable F. L. Co.*, 68 Mo. 617; *Stone v. Travelers' L. Co.*, 78 Mo. 655; *Gates v. Tusten*, 89 Mo. 13, 14 S. W. 827.

1. **The Return of Service of Process.**—To warrant service of process on a foreign corporation, it is necessary, as we have shown, either that it is a corporation which is or was doing business within the state, or that it had appointed some agent therein on whom such service may be made. It is generally true that the facts justifying the service must affirmatively appear by the record, and that presumptions will not be indulged in favor of a return of service not regular on its face: *United States v. American Bell Tel. Co.*, 29 Fed. 17. But we apprehend that it is not necessary that the return should affirm that the corporation had done or was doing business within the state: *Frick Co. v. Wright* (Tex. Civ. App.), 55 S. W. 608. This fact, in so far as necessary to support the jurisdiction, usually appears from the averments of the complaint, and is inferable from the statements in the return to the effect that process was served within the state on an officer or agent of the corporation.

It must appear by the return that the process was served on some one of the several persons or classes of persons on whom the statute allowed it to be made, but this may appear by a general statement and without disclosing the probative facts from which the officer has drawn his ultimate conclusion. Hence a return is sufficient which shows service of process on an agent of the defendant corporation, providing the statute has authorized service on agents generally without restriction as to their character or class: *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534; *Fulton v. Commercial etc. Assn.*, 172 Pa. St. 117, 33 Atl. 324; *Howard v. Chesapeake etc. Ry. Co.*, 11 App. D. C. 300; *Bragdon v. Perkins-Campbell Co.*, 82 Fed. 838; but if the service must, by the statute, have been made upon a particular class of agents, or upon an agent of the class specified only under special circumstances,

then their return must show that the person served belonged to the class, or that the special circumstances required to authorize the service existed: *Southern etc. Assn. v. Hallum*, 59 Ark. 583, 28 S. W. 420; *Venner v. Denver U. W. Co.* (Colo. App., Sept., 1900), 63 Pac. 1061; *Toledo I. Co. v. Munger*, 124 Mich. 4, 82 N. W. 663; *Continental Ins. Co. v. Mansfield*, 45 Miss. 311; *Gamasche v. Smythe*, 60 Mo. App. 161; *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597; *Adkins v. Globe F. I. Co.*, 45 W. Va. 334, 82 S. E. 194; *Kiufek v. Merchants' D. T. Co.*, 11 Fed. 282.

VII. The Effect of the Judgment.

When a judgment is rendered against a foreign corporation upon service of process, either upon some agent specially designated by it, in obedience to some statute requiring it to make such designation, or upon some agent not so designated, but whose relation to it is clearly that of an agent upon whom, by authority of the statutes of the state, process against it may be served, the question necessarily arises whether such judgment is to be given an effect restricted to the state where it was rendered, or to the property of the corporation therein, or is it entitled to the same respect, and does it result in the same legal consequences, as if it were a judgment against a domestic corporation, obtained after service of process upon its officers within the state. We believe it to be now settled beyond further controversy that a judgment against a foreign corporation upon service of process made within the state, upon an agent sufficiently representing it to justify such service, is, for all purposes, a valid and enforceable judgment in personam, and must be given effect as such in every state in which it may be presented or called into question: *Atlantic etc. R. R. Co. v. Jacksonville etc. R. R. Co.*, 51 Ga. 458; *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204, 46 Am. St. Rep. 335, 40 N. E. 488; *Johnson v. Trade I. Co.*, 132 Mass. 432; *Wilson v. Martin-Wilson F. A. Co.*, 149 Mass. 24, 20 N. E. 318; *Gibson v. Manufacturers' etc. Co.*, 144 Mass. 81, 10 N. E. 729; *McNichol v. United States etc. Agency*, 74 Mo. 457; *March v. Eastern R. R. Co.*, 40 N. E. 548, 77 Am. Dec. 732; *Gibbs v. Queen L. Co.*, 63 N. Y. 114, 20 Am. Rep. 513; *Pringle v. Woolworth*, 90 N. Y. 502; *Atlantic etc. T. Co. v. Baltimore etc. R. R. Co.*, 46 N. Y. Super. Ct. 377; *Peters v. Neely*, 16 Lea, 275; *Lafayette Ins. Co. v. French*, 18 How. 404,

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

FREUNDT v. HAHN.

[24 Wash. 8, 63 Pac. 1107.]

DEFINITIONS. — “WHEN CAUSE OF ACTION HAS ARISEN” should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action. (p. 940.)

LIMITATION OF ACTIONS—NONRESIDENTS.—A statute providing that “when a cause of action has arisen in another state between nonresidents of this state, and by the laws of the state where the action arose an action cannot be maintained thereon by reason of lapse of time, no action shall be maintained thereon in this state,” does not apply to an action on a note by a resident of the latter state against a nonresident, if, at the time of the execution of the note, both parties were nonresidents and the payee had taken up his residence in the state, prior to the maturity of the note. (pp. 939, 940.)

F. H. Peterson, for the appellants.

A. Munter, for the respondent.

• **REAVIS, C. J.** Action brought in March, 1899, against appellants, who were then and at all times mentioned residents of California; jurisdiction was obtained by attachment in this state, to recover upon two promissory notes executed by Charles Hahn and one R. Wittke. There are two causes of action alleged in the complaint, which are identical except as to the amounts of the notes and the allegations of payment thereon. The first note was for twelve hundred dollars, made in Los Angeles, California, February 7, 1888, and the last payment thereon made January 19, 1895. The second note was for one thousand dollars, made at the same time and place, and the last payment was made at the same date as upon the other note.

The substantial defense to the action was that no action could be maintained upon either of the notes, because the statute of limitations of California barred the action after four years from the maturity of the notes, and by reason of section 4818 of Ballinger's Code, the statute of limitations of California pleaded here was applicable, and the bar of the California statute was a complete defense. Section 4818, *supra*, is as follows: "When the cause of action has arisen in another state, territory, or country between nonresidents of this state, and by the laws of the state, territory, or country where the action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state."

¹⁰ The determination of the question depends upon the meaning of the words "arisen" and "arose" in the section quoted. Counsel for appellants maintains that the words "arisen" and "arose" are used in the sense of "originated," and, therefore, that, as the notes were executed and payable in California, the cause of action "arose" at the time the notes were executed; that those words are not used in the sense of "accrued," which specially means when the right to sue exists. The word "arise," it is true, has not been used with uniform signification in different statutes. Thus, in the case cited by counsel (*Emerson v. Steamboat Shawano City*, 10 Wis. 433) the court remarked: "A cause of action may be said to arise when the contract out of which it grows is entered into or made." Also, *Steele v. Board of Commissioners*, 70 N. C. 139, where a statute provided that actions must be tried in the county where the cause, or some part thereof, arose, it was held that the expression, "where the cause of action arose," meant where a debt was contracted, and not the place of the failure to pay the debt. But it does not appear that an action could not have been maintained in the county where the cause, or some part thereof, arose. It is elementary doctrine that under the common-law rule the statute of limitations of the forum in which the action is brought governs. Section 4818, *supra*, is a modification of the common-law rule, and authorizes the plea of the statute of limitations upon causes of action arising in another state between nonresidents of this state. In Illinois a statute of limitations reads as follows: "When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an action thereon ¹¹ shall not be maintained in this state": *Osgood v. Artt*, 10

Fed. 366. The supreme court of Illinois, construing this statute, said: "When a cause of action has arisen . . . should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin": *Hyman v. McVeigh*, 10 Leg. News, 157. See, also, *Berry v. Krone*, 46 Ill. App. 82.

It was admitted at the trial at the times the notes were executed plaintiff and defendants were residents of the state of California; that within one month after the execution and delivery of the notes the plaintiff left the state of California and came to this state, where he has continuously resided ever since; and that defendants during the whole time were, and now are, residents of the state of California. It is apparent that during the time plaintiff was a resident of the state of California no cause of action subject to cognizance in the courts existed against the defendants. If the notes had been paid at maturity, no legal cause of action would have existed. It could neither have originated nor arisen until the breach of the contract to pay the money. Before the maturity of the notes, the plaintiff, the payee, was a resident of this state. He was then a resident of this state when the jurisdiction existed in the courts to adjudicate between the parties, and at the time he had a right to sue the defendants. We think, as used in section 4818, *supra*, the cause of action arose between a resident of this ¹² state and a resident of California, and that the California statute of limitations is inapplicable.

The judgment is affirmed.

Dunbar, Fullerton, and Anders, JJ., concur.

The Statute of Limitations of the Forum must govern. Hence, a cause of action, not barred where it arose, may be barred by the law where it is sought to be enforced; and, on the other hand, although barred where it arose, may not be barred by the law of the forum: See the monographic note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 878; *Wright v. Mordaunt*, 77 Miss. 537, 78 Am. St. Rep. 536, 27 South. 640; *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; *Van Santvoord v. Roethler*, 35 Or. 250, 76 Am. St. Rep. 472, 57 Pac. 628; compare *Eingartner v. Illinois Steel Co.*, 108 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433.

HOWAY v. GOING-NORTHRUP COMPANY.

[24 Wash. 88, 64 Pac. 135.]

MASTER AND SERVANT—DAMAGES FOR WRONGFUL DISCHARGE.—If an action for the wrongful discharge of a servant is commenced during the term contracted for, but the trial occurs after the expiration of the term, he is entitled to recover the same damages that he would have been entitled to recover had the action been commenced after the expiration of the term. (p. 945.)

TRIAL—INSTRUCTIONS.—It is not error to refuse to give requested instructions if they have already been given in substance. (p. 945.)

Byers & Byers, for the appellant.

H. E. Snook, for the respondent.

80 DUNBAR, J. This is an action by a discharged employé against the employer. In August, 1898, the appellant hired the respondent for the term of one year, at a specified rate of wages. Respondent entered into the service of the appellant and was, on November 26th, discharged and paid in full up to the time of discharge. On November 28th, the respondent brought suit against the appellant, claiming damages for breach of contract, by reason of his wrongful discharge, in the sum of seven hundred and twenty-two dollars, which was the amount that would have been due him at the end of his term of employment, he having given credit for the amount paid him at the time of his discharge. The complaint is brief, alleging the contract of employment, which was in writing; the wrongful discharge and refusal of the appellant to allow the respondent to continue or remain in its employ; alleging faithful and efficient service on his part in every way in the performance by him of the contract; alleging that by reason of the wrongful discharge by appellant he has been damaged in the sum of seven hundred and twenty-two dollars, and praying judgment for that amount. A demurrer was interposed to the complaint and was overruled. Objection was raised to the admission of testimony under the complaint, for the reason that it did not state a cause of action, which objection was overruled. A default was prayed for at the close of the testimony, which was also denied. Judgment was rendered for three hundred dollars. The judgment was based evidently on the salary contracted for, less the amount paid and less the salary for the

time during which plaintiff had obtained other employment, he testifying that for a portion of the time ⁸⁰ during the term for which he was employed by appellant he had obtained other employment.

It will be noticed that this suit was brought two days after the discharge of the respondent by the appellant, but it was not tried until the term of employment under the contract had expired. It is the contention of the appellant that the complaint does not state facts sufficient to constitute a cause of action; 1. Because there is no sufficient allegation of damages for breach of contract; and 2. Because it is not alleged, in terms, that the respondent ever offered to continue in the employment or offered to perform work for the appellant. Without setting forth in full the language of the complaint, we think it sufficiently appears that the respondent was prevented from performing his portion of the contract. Nor do we think, under the authorities as contended for by the appellant, that the recovery of the respondent should be limited to the damages accruing between the breach of the contract and the time of the commencement of the action, which in this case would be nominal, the time being only two days. There has been some conflict of authority on this proposition, and 14 American and English Encyclopedia of Law, page 797, cited by appellant to sustain its contention, under the subject of "Remedies of Servant for Wrongful Discharge," is as follows: "Where an employé for a fixed period, at a salary for the period, payable at intervals, is wrongfully discharged, he may pursue any one of four courses: 1. He may sue at once for a breach of contract; . . . 2. He may wait until the end of the contract period, and then sue for the breach; 3. He may treat the contract as existing and sue at each period of payment for the salary then due; 4. He may treat the contract as rescinded and sue ⁸¹ immediately on a quantum meruit for the services performed."

But, in the first instance, it is said he can only recover his damages up to the time of bringing suit. In support of this proposition that the plaintiff can recover damages only up to the time of bringing suit the following cases are cited: Colburn v. Woodworth, 31 Barb. 381; Booge v. Pacific R. R. Co., 33 Mo. 212, 82 Am. Dec. 160; Nations v. Cudd, 22 Tex. 550; Gordon v. Brewster, 7 Wis. 355, and many others. But these cases do not sustain the text. All that is held in Colburn v. Woodworth, 31 Barb. 381, is that these remedies are not cumulative, and that an action upon one and judgment upon it will operate

as a bar to any further action; that the error, if any, should be corrected in that action by review of the verdict or judgment and not by a new action for the same cause. The question of whether the plaintiff could recover damages only up to the time of bringing suit was not involved or discussed. *Booge v. Pacific R. R. Co.*, 33 Mo. 212, 82 Am. Dec. 160, involves exactly the same proposition. In *Nations v. Cudd*, 22 Tex. 550, the rule laid down in *Meade v. Rutledge*, 11 Tex. 44, and *Hassell v. Nutt*, 14 Tex. 260, that the discharged servant could maintain his action for damages immediately upon the breach of the contract by his employer, was sustained. In *Gordon v. Brewster*, 7 Wis. 355, it was decided that the measure of damages was the rate of the salary from the time of the breach up to the time of the trial, less the amount plaintiff might have earned in the meantime, but that the damages could be computed and recovered only from the time of the breach up to the time of the trial. In that case the court said: "Had the respondent seen fit to wait before bringing his action until the period had elapsed for the complete performance of the agreement, the measure of compensation ⁹² would then have been easily arrived at. We suppose he would then have been entitled to the entire amount of his salary, less what he would have reasonably earned during the time covered by the remainder of the contract in laboring elsewhere. But as the case now stands, we think he was only entitled to recover his salary on the contract down to the day of trial, deducting therefrom any wages which he might have received, or might have reasonably earned in the meantime. This rule appears to us to be the most equitable and safe of any that occurs to our minds, and the one most likely to effect substantial justice between the parties."

It will thus appear that exactly the contrary doctrine was held from that announced by the learned author of the encyclopedia, above quoted. The same rule is adopted by Sutherland on Damages, second edition, section 692, in which the case of *Gordon v. Brewster*, 7 Wis. 355, is reviewed and the rule announced indorsed. The case of *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319, is a case exactly parallel with the case at bar. Said the court: "The only question presented upon this appeal relates to the rule of damages to be applied in an action for a breach of a contract of employment where the servant has entered upon the performance of a contract, has been discharged, and brings his action before the expiration of the term, but the trial does not occur until afterward."

After discussing the contention which the appellant makes in this case, the court says: "The plaintiff's cause of action arose at the time of the breach of the contract, and he was then entitled to sue and recover such actual damages as the evidence upon the trial showed he had sustained by the defendant's breach. It is the breach and not the time of complaining of it which gives the damages"; citing Lord Mansfield to the effect: "It is agreeable to principles of common law that ⁹³ whenever a duty has incurred pending the writ, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given on the action already pending"; citing, also, Sedgwick on Measure of Damages, first edition, 107, to the effect: "If the original tort or breach of contract is such that the plaintiff would be entitled to nominal damages, then he can go on to give evidence of those consequences of the act which are immediately traceable to it, although they have taken place after the commencement of the suit." And the following from the same author, page 122, sixth edition: "If there is a breach of contract, the right to nominal damages exists at once to vindicate the right, and suit may be brought. If those consequences for which the law renders the party in default responsible have developed themselves so as to create absolute injury before the verdict, the jury are bound to give compensation for such injury; but if at the time of the trial the loss is still only probable, the verdict should be for nominal damages."

In concluding the opinion, the court in that case said: "Where the cause of action is commenced during the term, but the trial occurs after the expiration of the term of service, we can see no reason why the plaintiff may not be permitted to recover the same damages that he would have been entitled to recover had the action been commenced after the expiration of the term."

This, we think, voices the weight of authority on this subject. It is insisted that the court erred in its first and second instructions, and should have given the instruction asked for in lieu thereof by the appellant; but we think the court's instructions were substantially as asked for by the appellant, and the court was under no obligation to incorporate the language of the appellant ⁹⁴ into its instruction. The other instructions complained of are based upon the theory of the appellant that no damages could be recovered which had accrued after the commencement of the action, and this objection is disposed of

by what we have said in relation to the sufficiency of the complaint.

No error appearing in the trial of the cause, the judgment is affirmed.

Reavis, C. J., and Fullerton and Anders, JJ., concur.

Damages for the Wrongful Discharge of a Servant are considered in the monographic notes to McMullan v. Dickinson Co., 51 Am. St. Rep. 515-518; Decamp v. Hewett, 43 Am. Dec. 205-214. If a discharged servant brings his action for breach of contract before the expiration of the term of service, but the trial does not take place until after the expiration of the term, he may recover the same damages that he would have been entitled to had the action been commenced after the expiration of the term: Everson v. Powers, 89 N. Y. 527, 42 Am. Rep. 319. An employé wrongfully discharged may recover such damages as develop up to the time of trial: See the extended note to Decamp v. Hewett, 43 Am. Dec. 214.

CANADIAN AND AMERICAN MORTGAGE AND TRUST COMPANY v. BLAKE.

[24 Wash. 102, 63 Pac. 1100.]

CONSTITUTIONAL LAW—MORTGAGE FORECLOSURE—HOMESTEADS.—A statute providing that, in case of any homestead occupied for that purpose at the time of foreclosure or execution sale thereof, the judgment debtor shall have the right of redemption without accounting for issues or value of occupation, is unconstitutional when applied to a foreclosure sale under a mortgage executed prior to its passage and under a statute giving the foreclosure purchaser the right of possession from the day of sale. (pp. 946, 947.)

M. A. and W. W. Langhorne, for the appellants.

J. E. Willis, for the respondent.

102 DUNBAR, J. This was an action by respondent against appellants to foreclose a mortgage. The mortgage was executed February 3, 1893, and suit to foreclose the same was commenced on the second day of May, 1899. The court decreed that the purchaser was entitled to immediate possession of the land to be sold, after sale. From this portion of the decree this appeal is taken.

The trial court held that section 15, chapter 53, of the Laws of 1899, which provides that, in case of any homestead occupied for that purpose at the time of sale, the judgment debtor shall

have the right of redemption without accounting for issues or value of occupation, was unconstitutional ¹⁰³ when applied to contracts executed prior to its passage. It is claimed that the decision by this court of the case of *Wilson v. Wold*, 21 Wash. 398, 75 Am. St. Rep. 846, 58 Pac. 223, is decisive of the question involved in this appeal. That case does not seem to us to reach the question under discussion here. There, there was no lien existing; it was simply a contract for money to be paid, and it was held that the law which provided that judgment debtors should be entitled to possession, and to the rents, issues, and profits of real property which was sold on execution, did not deprive a party who had sued upon an open account of any right or the enforcement of any remedy which the prior law had given him. But in this case the contract is with special reference to the property upon which the lien is established by the contract. We think the principles underlying this case have been decided by this court in the case of *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, and more directly in *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489, where the authorities which distinguished between a simple remedy, which it is within the legislative power to change, and a remedy which is a part of the obligation of the contract, a change of which cannot be made without impairing and lessening the value of the contract, were collated and discussed at length. A rediscussion of these principles would not be beneficial. But we will refer again to one of the cases cited in *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489, viz., *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, where the supreme court of the United States, after an exhaustive review of the questions involved, decided that a state statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, ¹⁰⁴ cannot constitutionally apply to a sale under a mortgage executed before its passage. As to existing contracts, the law of 1899 was unconstitutional and void.

The judgment is affirmed.

Reavis, C. J., and Fullerton and Anders, JJ., concur.

A Statute Which Authorizes the Redemption of Property sold upon foreclosure of a mortgage, where no rights of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to

a sale under a mortgage executed before its passage: Note to State v. Sears, 54 Am. St. Rep. 809. See, further, Scobey v. Gibson, 17 Ind. 572, 79 Am. Dec. 490; Swinburne v. Mills, 17 Wash. 611, 61 Am. St. Rep. 982, 50 Pac. 489; Wilson v. Wold, 21 Wash. 898, 75 Am. St. Rep. 846, 58 Pac. 228.

DORAN v. SEATTLE.

[24 Wash. 182, 64 Pac. 230.]

NUISANCE—STATUTE OF LIMITATIONS.—If a trespass is followed by injury constituting a continuing nuisance, the damages for the original trespass must all be recovered in one action, but successive actions may be brought to recover damages for the continuation of the wrongful conditions, and in these the damages are estimated only to the date of the bringing of each suit. Hence, the statute of limitations does not begin to run from the date of the original trespass. (p. 953.)

W. E. Humphrey and E. Von Tobel, for the appellant.

J. F. Doré, J. W. Kelley, J. J. McCafferty and J. S. Mulvey, for the respondent.

¹⁸² DUNBAR, J. The plaintiff, Frank Doran, alleges that the defendant, the city of Seattle, negligently constructed a bulkhead in front of his premises, and on account of such negligence the bulkhead pressed against and injured his house. This suit was begun on the twenty-fourth day of January, 1898. The plaintiff's claim for damages was filed on the thirteenth day of September, 1897. On the trial, after the plaintiff had introduced his evidence, motion for nonsuit was made by defendant and denied by the court. The jury returned a verdict in favor of the plaintiff. The question involved in this appeal is in relation to the statute of limitations, and that question is raised by the following instructions asked by the defendant: "The plaintiff can have but one cause of action for damages under the facts of this case, and in the one action the plaintiff is entitled to recover for all damages, if at all, sustained by him, both past and prospective. The cause of action, if any, accrued to the plaintiff at the time of the first damages—no matter how small they may have been—that he sustained; and unless a claim for past and prospective damages was presented to the city council and filed with the clerk of the defendant within six months after the time the cause of action

accrued, and the action was commenced within two years after the first damages were sustained, there can be no recovery, and your verdict must be for the defendant."

"The statute requires actions for damages such as are claimed in the complaint to be commenced within two years after the right of action has accrued. If you find that the damages accrued to plaintiff's property more than two years before the commencement of this action, no matter how small that damage may have been, then the whole claim is barred by the statute of limitations, and your verdict must be for the defendant. The law will not ¹⁸⁴ permit the plaintiff to split his cause of action and to recover by piecemeal; but he must recover, if at all, for all damages, past and prospective, in one single action."

These instructions the court refused to give, but instructed as follows: "If you believe, from a preponderance of the evidence in this case, that in building and maintaining the bulkhead in question the defendant has not used such care as ordinarily prudent city officials, having similar work in charge, generally exercise in erecting and maintaining entirely similar bulkheads, and that through such failure the house of plaintiff was, within six months immediately prior to the giving of this notice of claim of plaintiff to defendant, injured by the gradual sliding of said bulkhead, then your verdict will be for plaintiff in one such gross sum as will, in your opinion, from the evidence, just compensate plaintiff for such injury as so accrued within said six months immediately prior to the filing of said plaintiff's claim with defendant."

It is insisted by the appellant that, according to the instructions given by the court, the statute of limitations began to run from the time the injury ceased, and not from the time the right of action accrued; that the case was tried upon this theory, which was an erroneous one. Passing the question of the legality of the statute in relation to the presentation of claims before the commencement of the action and within a certain time after the damages had occurred, we will proceed to the main question involved, which is decisive of the case, granting, for the sake of argument, that the filing of the claim was necessary.

There are a few cases which support the theory of defendant that the statute of limitations begins to run from the inception of the injury. In *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, it was held that whenever a nuisance

is of such a character that its continuance is necessarily an injury, and when it is of a ¹⁸⁵ permanent character that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated. In *Troy v. Cheshire R. R. Co.*, 23 N. H. 83, 55 Am. Dec. 177, the same doctrine was announced, although in that case it was held that if the act done was not necessarily injurious, or if it was contingent whether further injury would arise, the plaintiff could recover damages only to the date of his writ. In this connection it might be said that it would be difficult to tell in the case at bar whether the injury would continue, and, if so, to what extent. In *Fowle v. New Haven etc. Co.*, 107 Mass. 352, it was held that a judgment against a railroad corporation for damages, not limited to those actually suffered at the date of the writ, for locating and constructing their road on the bank of a river, so as to divert its course and cause it to wash away the plaintiff's land, is a bar to a like action by him against them for subsequent damages from the same cause. But it will be observed that in this case the decision was placed upon the ground that the damages in the other case had not been limited to those suffered at the date of the writ, and the rule contended for by the appellant cannot be said to have been adopted in Massachusetts, as, in the subsequent case of *Prentiss v. Wood*, 132 Mass. 486, it is held that an action for damages sustained within six years by the wrongful continuance of a dam is not barred by the statute of limitations, although the dam was erected without right more than six years before the date of the writ, the court in that case saying: "The ground taken by the defendants, that these suits are barred by the statute of limitations, cannot be maintained. A person who continues a nuisance is liable to successive suits, each continuance being a new nuisance, ¹⁸⁶ and therefore the plaintiff in these actions is entitled to recover for all damages accruing after the award above referred to, it being within six years of the date of his writs"; citing *Hodges v. Hodges*, 5 Met. 205.

The same doctrine was announced in *Wells v. New Haven etc. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724, and the question of permanency, upon which some of the courts have distinguished the cases, was discussed as follows: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful, as against the

plaintiff, unless by release or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner."

And the court noticed the decision in *Fowle v. New Haven etc. Co.*, 107 Mass. 352, and distinguished it from the case it was then deciding by saying: "The plaintiff [in that case] had brought a former action in which he expressly declared for prospective damages, and he was allowed by the court to recover them, apparently without any objection on this ground from the defendant; and if he had been allowed to hold his second verdict he would have got double damages, which clearly was not permissible. The decision of that case does not necessarily imply that an action must have been brought within six years, or if it does, we cannot follow it."

The case upon which appellant largely relies is that of *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, and the opinion, having been written by Judge Elliott, who is recognized by the bar of this country as a learned author and jurist, demands particular attention. In that case it was squarely held that in an action for injury to real estate caused by the negligence of corporation officers ¹⁸⁷ in constructing a public work of a permanent character, as the grading of a street, all damages, past and prospective, can be recovered in one action; that they must be recovered in one suit; and that, for fresh damages resulting from the original wrong, a second action cannot be maintained. A very vigorous opinion is written in that case, but with due deference to the eminent judge who wrote the opinion, we are inclined to think that both reason and authority concur in overruling the rule there announced.

In *Uline v. New York Central etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536, where an elaborate and painstaking investigation of this question was indulged in and the authorities collated, it was decided that where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action, and that for any damages thereafter sustained, other actions might be brought successively until the nuisance should be abated. In the discussion of this question Judge Earl, who wrote the opinion for the court, in noticing the case of *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, and after discriminating that case to a certain extent from the one in question, said: "But the case is also inferentially authority for the

second ground of error upon which I have based my conclusion. . . . But I am of opinion that that decision is clearly unsound as to the precise question adjudged. What right was there to assume that the street would be left permanently in a negligent condition and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation under proper authority may erect an embankment in a street, and if the work be carefully and skillfully done, it cannot be made liable for the consequential damages to adjacent property. ¹⁸⁸ But if it be carelessly and unskillfully done, it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment, and this it may do after its carelessness and unskillfulness and the consequent damages have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrongdoer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken and foresee them long before, it may be many years before, they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued and that the wrongdoer will not discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this state, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated."

And it may be added that, under the logic of the doctrine announced in the Indiana case, the wrongdoer might, by the payment of prospective damages, actually become permanently possessed of real property which, under the theory of the law, can only be taken by corporations under the provisions of the law in relation to eminent domain. In addition to this, the rule is inequitable, in that the damages in the first instance and before the statute of limitations expires may be so trifling that it would not justify litigation. It would be inequitable and not in accordance with good morals to estop a person from obtaining his rights or damages for injuries which might even-

tually become burdensome, because he was not ¹⁸⁹ litigious enough to plunge into a lawsuit over a trifling matter. It is said by the appellant that the cases cited above are not in point, for the reason that the wrongs committed were nuisances; but an examination of the many cases on this subject shows that they are treated in all instances as nuisances when they are wrong, and that the construction of that which is originally legal and right, if wrongfully constructed and maintained, may become a nuisance. Under the title "Trespasses Resulting in Continued Nuisances," it is said in 5 American and English Encyclopedia of Law, page 17: "The rule here is a combination of the two rules just given. The institution of the wrong is treated as a trespass, while the continuance of it is treated as a nuisance. The damages for the original act of trespass are all to be recovered in the first action, but successive actions must be brought to recover for damages for the continuation of the wrongful conditions, and in these the damages are estimated only to the date of the bringing of each suit."

In *Aldworth v. Lynn*, 153 Mass. 53, 25 Am. St. Rep. 608, 26 N. E. 229, the rule of continuing damages was announced, the contention of the plaintiff in that case being that, if the damage resulted from a cause which was either permanent in its character or which was treated as permanent by the parties, it was proper that the entire damages should be assessed with reference to past and probable futures. The attorney in that case cited *Fowle v. New Haven etc. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724, and *Troy v. Cheshire R. R. Co.*, 23 N. H. 83, 55 Am. Dec. 177, and the court in its opinion said: "So far as there are intimations in the opinions of *Fowle v. New Haven etc. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724, which seem to make the case an authority for the plaintiff's contention in the case at bar, we are not inclined to follow them."

In *Mayor of Nashville v. Comer*, 88 Tenn. 415, 12 S. W. 1027, ¹⁹⁰ it was held that damages for an alleged negligent construction of a sewer, in consequence of which plaintiff's premises are injured by discharge therefrom, must be limited to the actual damage sustained up to the time of bringing suit, and cannot include prospective damages on the ground that the defects are permanent, although human labor will be necessary to remedy the defects. In this case the same cases were cited, viz., *Troy v. Cheshire R. R. Co.*, 23 N. H. 83, 55 Am. Dec. 177,

and *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, to sustain the doctrine that all the damages must be included in one suit, and the court in passing upon that question, after laying down the rule that damages could be assessed only up to the time of the writ, and after reviewing the arguments in the cases cited to sustain the opposite contention, among other things said: "This seems to us an artificial and arbitrary test. There are supposable nuisances, which, by the effect of time, might at last abate themselves, but by far the greater number of trespasses, wrongs, and nuisances would continue indefinitely, without the expenditure of human labor to remove or abate them. It is a rule which does not recommend itself by either its reasonableness, its certainty of application, or its justice."

And, after noticing the rule announced in *Troy v. Cheshire R. R. Co.*, 23 N. H. 83, 55 Am. Dec. 177, and *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, it continued: "Thus the application of the rule now contended for would require a plaintiff to foresee all the possible results, and to convince a jury of what he, with prophetic ken, is required to foresee, on penalty of subsequently having to quietly endure consequences which he could not reasonably have conjectured as likely to result from what at first seemed a trifling injury. The cases of *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, and *Fowle v. New Haven etc. Co.*, 112 Mass. 334, 17 Am. Rep. 106, have been examined, and we find ¹⁹¹ that they do measurably support the contention of defendants in error. None of these cases are satisfactory in their reasoning and the decided weight of authority is opposed to them": See, also, *Blunt v. McCormick*, 3 Denio, 283; *Greene v. New York Cent. etc. R. R. Co.*, 65 How. Pr. 154; *Powers v. Ware*, 4 Pick. 106; *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Schell v. Plumb*, 55 N. Y. 592; *Mahon v. New York Cent. R. R. Co.*, 24 N. Y. 658.

The rule contended for by appellant, it seems to us, would work unnecessary hardship, is fraught with doubt and uncertainty in its application, and we are not inclined to adopt it. The instructions of the court were without error, and the judgment is, therefore, affirmed.

Reavis, C. J., and Fullerton and Anders, JJ. concur.

Limitation of Actions.—If a nuisance is transient rather than permanent in its character, the continuance of the injurious acts is considered a new nuisance, for which a fresh action will lie;

and, although the original cause of action is barred, damages may be recovered for the continuance of the nuisance within the period of the statute of limitations: Note to St. Louis etc. Ry. Co. v. Biggs, 20 Am. St. Rep. 177; Austin etc. Ry. Co. v. Anderson, 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484. See, too, Wells v. New Haven etc. Co., 151 Masa. 46, 21 Am. St. Rep. 423, 23 N. E. 724.

MATHESON v. WARD.

[24 Wash. 407, 64 Pac. 520.]

WATER AND WATERCOURSES.—Acquiescence in the diversion of a stream from its natural channel by riparian owners below the point of diversion for thirty years is binding on them, and prevents them from changing the flow of the stream from the new into the old channel. (p. 957.)

COST BILL—NEGLECT TO FILE IN TIME.—If the party obtaining judgment neglects for more than the statutory period to file his cost bill, such bill may be stricken out, except as to fees appearing upon the face of the papers in the cause. (p. 958.)

VENUE—SIGNING OF FINDINGS.—The judge who tries a case in the proper county may sign the findings and judgment in a county other than that in which the case is tried. (p. 958.)

G. C. Hatch, for the appellants.

A. Weir and W. E. Humphrey, for the respondents.

408 MOUNT, J. The Dungeness river rises in the Olympic mountains, and flows in a northerly course through Clallam county into the Straits of Fuca. It is a rapid stream, and at time of freshets, which occur semi-annually, frequently overflows its banks, and floods the surrounding lowland, and does great damage to cultivated lands. Especially is this true near its mouth. About four miles south of its mouth, at a place known as "Potter's crossing," the river forks into three branches. The east branch is known as "Hurd's creek channel," the central or main branch being known as the "east channel," and the one farther west as the "west channel." Neither plaintiffs nor defendants own any of the land at these forks, nor within one or two miles thereof, but all own lands farther to the north, which are subject to the overflow at times of high water, plaintiffs' land being some two miles from these forks, and along Hurd's creek channel, east of the main channel, and defendants' lands being about the same distance north, and on the west side of the main channel. Some time prior to the year 1865 one Le Balister built a wing dam somewhere

near Potter's crossing, and about opposite the head of Hurd's creek channel, which diverted all the flow of water into the east channel and Hurd's creek channel, so ⁴⁰⁹ that for a period of thirty years no water ran into the west channel, except probably at times some seepage; and this west channel thereby became obliterated as an active channel, and near its head trees and brush grew in the same, and banks were formed, so that no water ran out of the river into this channel excepting during very high water. In 1895 the owners of lands on the east side of said river and on Hurd's creek channel some two miles north of Potter's crossing, without the knowledge of those living on the west side, excavated at or near said crossing, which is the place at which the river forks as aforesaid, a channel of from ten to forty feet wide, from two to four feet deep, and forty to one hundred and twenty feet in length, and placed a wing dam in the main channel so that thereafter almost the entire stream was thereby diverted from Hurd's creek channel and the east channel into the west channel. At times of high water the lowlands, including the lands of defendants, were flooded and badly damaged thereby. In January, 1900, defendants, who own lands along and near this west channel to the north, attempted to clear out the drift wood and debris at and near the forks as aforesaid, in the east channel, and to close up the west channel, and thereby turn the water again into Hurd's creek and the east channels. This action was brought by plaintiffs to restrain defendants from so doing. After a trial by the lower court, and findings in favor of the defendants, and judgment dismissing the complaint and giving defendants affirmative relief, plaintiffs appealed.

It is admitted in the cause that the Hurd's creek channel and the east channel are natural channels, in which the waters of the Dungeness river have been accustomed to flow from time immemorial. It is also admitted that from 1865 down to 1895 no water flowed in the west channel except ⁴¹⁰ a seepage, and at extreme high water when the Dungeness river overflows its banks. It is also admitted that in 1895 an excavation was made by the persons living on Hurd's creek on the west side, so that at the time of the trial the principal flow was in the west channel. As stated by appellants, the whole cause turns on the question whether the west channel was an artificial channel or not. Much evidence is quoted by appellants in their brief to the effect that many years ago there was a natural channel in the west, and that one Le Balister, in 1865, closed

up this channel by a dam, and that thereafter it filled up by sediment and brush, and no water ran through it at low and ordinary high water. Conceding this to be true, viz., that prior to 1865 it was a natural channel, although the evidence is conflicting upon this point, the admissions already stated make the determination of the question one of law for the court, rather than one of fact. Even if the west channel was a natural channel prior to 1865 and was then dammed up, and the water diverted to the east and Hurd's creek channels, where it was confined for thirty years, and this flow was acquiesced in by the riparian owners and others along the channels of said river, this would make the east and Hurd's creek the natural channels; and defendants and others purchasing and improving lands along the old channel, and relying upon the flow continuing in the channels thereby formed, could not now have their lands damaged by reason of the water being turned back by artificial means after that lapse of time. After the lapse of thirty years the channels known as the "east" and "Hurd's creek" became natural channels, and the attempt of riparian or other owners to change the flow at this late day to the injury of persons on the old channel would be unlawful. According to the evidence it is probably true that in the year 1865 one Le Balister, by means ⁴¹¹ of a dam or embankment, changed the flow of water out of the west channel. Conceding it to be so, the acquiescence by plaintiffs and their grantors and all riparian owners below the point of divergence for a period of thirty years has now lost them the right to change the flow from the new into the old channel: 28 Am. & Eng. Ency. of Law, 964; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344; Ford v. Whitlock, 27 Vt. 265; Angell on Water-courses, 7th ed., sec. 108h.

Gould on Waters, second edition, at section 159, says: "When a stream flowing through a person's land is diverted into a new channel, either artificially or by sudden flood, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream cannot be lawfully returned to its former channel."

No doubt the plaintiffs, within a reasonable time after such diversion, could have removed the obstruction placed across the west channel by Le Balister; but when, after thirty years, they undertook to do so by virtually making a new channel,

they were invading the rights of those below who had purchased lands, and improved the same. Hurd's creek and east channels having become the natural channels, defendants had the right to the natural flow through the same. Likewise, if the west channel had been opened without consent of the lower owners by artificial means, and these lower owners thereby suffered injury to their lands which were under cultivation, by reason of the flood which would not naturally flow over their lands, they might replace the embankments, and restrain plaintiffs from interfering with the same: *Angell on Water-courses*, 7th ed., secs. 333, 334, 428, 429; *Gould on Waters*, sec. 413; *Mathewson v. Hoffman*, 77 Mich. 420, 43 N. W. 883; ⁴¹² *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528.

We have carefully examined the record, and are convinced that the findings of the lower court are correct, and in accordance with the weight of the evidence.

Judgment in this case was entered on May 29, 1900, and on June 16th a cost bill was filed. Plaintiffs thereupon moved to strike the said cost bill, because the same was not filed within time, which motion was denied. This was error. The code provides (*Ballinger's Code*, sec. 5173), that this cost bill "shall be filed with the clerk of the court within ten days after the judgment." Counsel for defendants seek to overcome this provision of the statute by filing an affidavit which states, in substance, that counsel relied upon one of the defendants to furnish him the items therefor, and that defendant neglected so to do until the time had elapsed. Even if this showing were permissible, it is not sufficient: *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409. The court should have sustained the motion as to all the items thereof except clerk's fees and all fees appearing on the face of the papers, which amounted to seventeen dollars.

The appellants also insist that the judge who tried this case, being called from another county, had no authority to sign the findings and judgment outside of Clallam county. There is no merit in this contention. While it is true that the trial must be had in the proper county (*State v. Neal*, 19 Wash. 642, 54 Pac. 31), "it was not the signing, but filing of the findings and order for judgment that determined the action. We are quite confident that there is no law that requires a judge to deliberate upon a case or to prepare his findings and order for judgment in the county in which the cause is pending": *Cumstock Q. M. Co. v. Superior Court*, 57 Cal. 625.

⁴¹³ The decree will be modified to the extent of striking out all the items of the cost bill except the items named above, and in all other respects the decree is affirmed, with costs to the respondents.

Reavis, C. J., and Fullerton and Anders, JJ., concur.

Waters and Watercourses.—The artificial state or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing; and from it arises a right on the part of those interested to have the new condition continued: *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30, 70 N. W. 1115. Thus, a stream which has been diverted from its natural channel by a freshet, and allowed by an adjoining proprietor to flow over his land for ten years, cannot be restored by him to its original course: *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 844. See, too, *Norton v. Valentine*, 14 Vt. 239, 39 Am. Dec. 220.

ANDERSON v. TINGLEY.

[24 Wash. 537, 64 Pac. 747.]

LIENS—WAIVER OF.—If a person engaged in getting out logs contracts with his employer that the latter may sell such logs and pay him from the purchase price thereof, he thereby waives his right to the statutory logger's lien. (p. 959.)

E. C. Million, for the appellant.

⁵³⁸ **PER CURIAM.** This cause is here on appeal from the superior court of Skagit county, and is an action for the foreclosure of a logger's lien. Several of the questions suggested in appellant's brief have already been decided by this court adversely to appellant in *Anderson v. Tingley*, 20 Wash. 592, 56 Pac. 371, which was an application for a writ of mandamus against the superior court, and grew out of this cause, which is now here for decision on the merits. No statement of facts is brought here with the record, and the cause is submitted on the court's findings of facts and conclusions of law. The third finding of facts is as follows, to wit: "That on or about the first day of November, 1898, the plaintiff and defendant entered into an agreement whereby the plaintiff was to cut, bark, swamp, and tend hook in the procuring of certain saw logs, and was to receive therefor in full for all of said work the sum of one dollar per thousand feet board measure; and it was especially agreed that the amount of said logs so cut was to be de-

terminated by the mill scale or the scale at which said logs were sold to some mill on Puget Sound, and that the plaintiff should not have and receive his pay for said services until the defendant had sold said logs and received the proceeds thereof from such mill."

Were it not for the latter portion of the said finding, we should see no objection to affirming the judgment. The difficulty we encounter is in the following words of the finding, to wit: "It was especially agreed that the amount of said logs so cut was to be determined by the mill scale or the scale at which said logs were sold to some mill on Puget Sound, and that the plaintiff should not have and receive his pay ⁵²⁰ for said services until the defendant had sold said logs and received the proceeds thereof from such mill."

We think the contract as found by the court must be held to negative the intention of respondent to claim a lien. He could not retain possession and dominion over the logs for the purposes of a lien and at the same time permit the appellant to sell them to some mill and pay him from the proceeds of such sale. "There can be no lien, at common law or by usage, where the parties make a special agreement inconsistent with a lien, either for a particular mode of payment, or for payment at a future particular time, although without such agreement the right to a lien would be implied or recognized. If such agreement is antecedent to the possession, no lien is created; if it is made afterward, the lien is waived": 1 Jones on Liens, 2d ed., sec. 1002.

Again, quoting from section 747 of the same volume: "One who contracts to haul and deliver lumber on board cars, at an agreed price to be paid when the lumber is sold in the market and the proceeds are received by the owner, has no lien thereon for his labor. The obligation to deliver the lumber before payment negatives the right to detain until payment. He has waived the lien by his contract, and cannot set it up in violation of his contract." See, also, cases cited under said sections.

We think the contract involved here falls within the rule above announced. It is true the subject of common-law liens is more directly under consideration in the text quoted; but we see no difference in the principle which must apply here. Retention of possession by the lienor was a necessary element of the common-law lien, and if one would maintain the statutory lien, he must also keep himself in position to retain dominion

and control over the property in the method provided by statute. This the respondent cannot do under his contract. He agreed that appellant might sell the logs and pay him from the \$40 purchase money, which can only mean that appellant was to have absolute possession, and was authorized to pass possession over to a purchaser. Respondent's counsel argues in his brief that appellant was to furnish certain supplies to respondent, and the court so finds; but we are unable to discover any finding that no supplies were furnished, and, in the absence of the evidence, we cannot say that there was a breach on the part of appellant that would operate to affect respondent's rights under the contract. Under the provisions of the contract the money was not due until the logs were sold. The findings show that the action was brought while the appellant was endeavoring to sell the logs. We think the court erred in its conclusions of law from the facts as found. The lien must be denied because of the terms of the contract.

The judgment is reversed and the cause remanded, with instructions to the court below to enter judgment for appellant dismissing the action, with costs to appellant.

A Lien is Waived by an agreement to receive payment in a particular mode inconsistent with the existence of the lien: *Stoddard Woolen Manufactory v. Huntley*, 8 N. H. 441, 81 Am. Dec. 198. A right to a lien ordinarily accompanying an implied contract does not exist whenever there is an antecedent contract inconsistent with the existence of such right, or when the implied contract is extinguished. No right of lien attaches in the first instance, and it is waived in the last: *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Dec. 634.

UNION MINING AND MILLING COMPANY v. LEITCH.

[24 Wash. 585, 64 Pac. 829.]

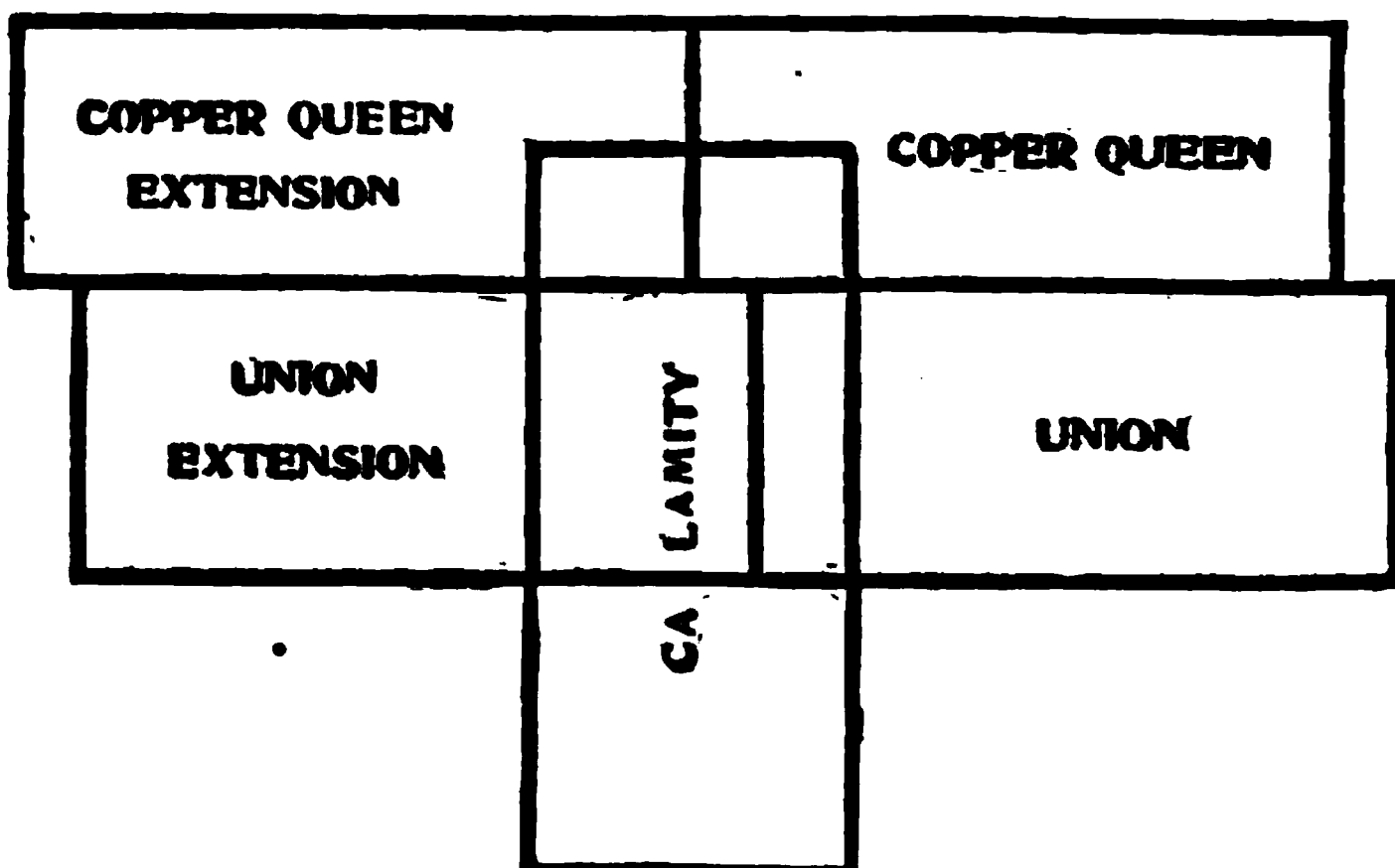
MINES AND MINING—MARKING BOUNDARY OF CLAIM—REASONABLE TIME.—Under United States Revised Statutes, sections 2320-2324, providing that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and that "the location must be distinctly marked on the ground so that its boundaries may be readily traced," the locator is entitled to a reasonable time in which to mark the boundaries of his claim after its discovery. What is such reasonable time is a question of law, and must depend upon the circumstances of each case, but generally eight days is not an unreasonable time within which to mark such boundaries after the discovery of the claim. (pp. 963, 965.)

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J. Neterer and Denny & Hulbert, for the appellant.

E. Scott, for the respondents.

⁵⁸⁶ MOUNT, J. The facts in this case are briefly as follows: The Calamity quartz claim was located in an unorganized mining district in Whatcom county, Washington, on August 19, 1897, by the defendants, who, at the time of the discovery, erected a monument at the point of discovery on the south end of the claim, and posted thereon a notice claiming fifteen hundred feet in a northerly direction from the post, three hundred feet west, and the same distance east. The said locators did not mark the boundaries on said claim until the twenty-seventh day of August. On the 22d of the same month the plaintiff's grantors located four claims known as the "Union," the "Union Extension," the "Copper Queen," and the "Copper Queen Extension," so as to overlap the north end of the Calamity, as shown by the following diagram:



At the time of the location of these latter four claims, the locators knew of the location of the Calamity, but did not know the exact location of the lines thereof. The whole party, consisting of some sixteen men, thirteen of ⁵⁸⁷ whom were the locators of this group, and the other three locators of the Calamity, had traveled into the district together, but each party located independently of the other. After the defendants had erected the monument and posted the notice of location on the Calamity claim, in the evening of Sunday, the nineteenth day of August, on the next day they located some nine other claims in the same vicinity in the same way. On

the following day—Tuesday—all three left the locations thus initiated and did not return until the 27th, when the boundaries of the Calamity claim were marked on the ground. The excuse given for this delay is that their provisions ran out, and they were compelled to go to the nearest supply station for provisions, which required the intervening time. On the 22d plaintiff's grantors located the group of four claims above named without the knowledge of the locators of the Calamity. It is conceded that the annual assessment work has been done since location by each of the parties hereto on all of said claims. In the subsequent workings the interests of the parties conflicted, and suit was brought by plaintiff to enjoin defendants from interfering with the minerals and work of plaintiff on the group of four claims named.

Several questions of minor importance are argued in the briefs, but the question decisive of the case, and upon which all the others depend, is, Did defendants, after discovery, have a reasonable time in which to mark the boundaries of the Calamity claim, so that the same might be readily traced upon the ground? And, if so, was eight days, under the circumstances, a reasonable time? At the time of the discovery in question, there was no law of the state defining the time within which the boundaries should be marked, or how they should be marked upon the ground, nor was there any local rule or custom in the district. ⁵⁸⁸ The decision of this question, therefore, depends upon the construction of the United States statutes governing the subject. Section 2320 of the United States Revised Statutes provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Section 2324 of the United States Revised Statutes provides that "the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries may be readily traced."

No exact time is limited within which the marking shall be done. Appellant, in his brief, relies upon the case of *Newbill v. Thurston*, 65 Cal. 419, 4 Pac. 409, and *Patterson v. Tarbell*, 26 Or. 29, 37 Pac. 76, which hold that the discoverer

must immediately locate his claim by distinctly marking the same on the ground so that the boundaries may be readily traced; and in default thereof a subsequent location, peaceably made, will prevail against a prior discoverer. This construction of the United States statutes is a strict construction, and can be correct only upon the theory that Congress intended the marking to be done without any delay. If this construction is correct, viz., that Congress intended the marking to be done immediately, then neither the miners nor the states could, by any rule or law, extend the time for the marking, because such rule or law would be in conflict with the United States statute. It is generally conceded that the legislature of the state may fix a time for marking the boundaries after discovery, and since the decisions named above ⁵⁸⁰ every mining state, with the possible exception of the state of Oregon, has passed a law fixing the time within which such marking shall be done. The decisions above referred to overlook the general rule that, where no time is limited for the doing of an act, a reasonable time therefor is impliedly given. Mr. Lindley, in his work on Mines, at section 339, volume 1, says: "As so much depends upon the locator determining the position of his vein in the earth and the course of its apex, and the consequences of a failure to make his location and establish his end lines, as the law contemplates, being accompanied with such serious results, it would seem that Congress never intended to compel the discoverer to immediately proceed at his peril with the marking of his boundaries. The posting of a preliminary notice, though not specially authorized by statute, should be sufficient to protect the discoverer for a reasonable time, at least, within which he might determine approximately the all-important facts upon which the value of his property to a great degree depends."

And (at section 372): "In the absence of state legislation or district regulation, it has been held, in California, that while a party in actual possession, proceeding with diligence to mark his boundaries, would be protected as against a stranger attempting to relocate, yet, strictly speaking, no time is allowed to the locator to complete his location by marking it on the surface. This view is also adopted by the supreme court of Oregon. But, as heretofore indicated, the circuit court of appeals for the ninth circuit, upon the same state of facts presented in one of the California cases, declines to accept the doctrine of the California courts, but follows the rule announced by the

supreme courts of Nevada and Idaho, and the manifest intent of the law as suggested by the supreme court of the United States and by the courts of last resort in Colorado and South Dakota. It is unnecessary to here repeat what we have said on this subject in a preceding section. For the reasons therein⁵⁹⁰ suggested, we are of the opinion that the rule announced in California is opposed to both the spirit of the law and the weight of authority": Citing *Doe v. Waterloo Min. Co.*, 70 Fed. 455; *Gleeson v. Martin White Min. Co.*, 13 Nev. 442; *Burke v. McDonald*, 2 Idaho, 646, 33 Pac. 49; *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560; *Murley v. Ennis*, 2 Colo. 300; *Patterson v. Hitchcock*, 3 Colo. 533; *Marshall v. Harney Peak Tin Min. Co.*, 1 S. Dak. 350, 47 N. W. 290.

The authorities cited bear out the conclusions of the learned author, and, in our opinion, his conclusions are correct. As to what is a reasonable time is a question of law and depends upon the circumstances of each particular case. Counsel argue that, because defendants located nine other claims upon the following day, they could and should have completed the marking of the boundaries of the Calamity immediately. This fact, while it may be considered as an indication of abandonment or want of good faith, is not conclusive of either. The defendants might have rested on that day, or they might have started for supplies, as they did on the following day. The result, in any event, would have been the same, for the overlapping claims were located on the 21st, 22d, or 23d, without the knowledge of defendants, and after knowledge on the part of the plaintiff's grantors that the Calamity had been located, and after they had read the description thereof on the notice. The law held the defendants to reasonable diligence. The country where the Calamity was located was rough, and at one corner inaccessible. The defendants, thinking they had a reasonable time to complete their location, being without provisions, were at liberty to devote a short time to other necessities. Good faith demanded of plaintiff's grantors that they should make inquiries of the defendants whether they intended to follow up their location or abandon the same, or, at least,⁵⁹¹ wait a few days before locating an adverse claim thereon. We are of the opinion that eight days, under the circumstances, was not an unreasonable time within which defendants should mark the boundaries of the Calamity claim on the ground, and that defendants' location was therefore prior in time to that of plaintiff's grantors.

We have carefully examined the record in the case, and conclude that the facts as regards the existence of mineral and discovery thereof prior to the location and the recorded notice and amendment thereof are in accord with the findings of the lower court.

The judgment will, therefore, be affirmed.

Reavis, C. J., and Fullerton and Dunbar, JJ., concur.

The Boundary of a Mining Claim must be distinctly marked at the time of its location: *White v. Lee*, 78 Cal. 593, 12 Am. St. Rep. 115, 21 Pac. 363. As to what amounts to a sufficient marking of the boundaries, see *Farmington etc. Min. Co. v. Rhymney etc. Co.*, 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832; *Risch v. Wiseman*, 36 Or. 484, 78 Am. St. Rep. 783, 59 Pac. 1111; *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 943.

BLUMAUER v. CLOCK.

[24 Wash. 593, 64 Pac. 844.]

CHATTEL MORTGAGES—CREDITORS—PRIORITIES.—

A chattel mortgage, unless executed and recorded in the manner provided by statute, is void as against creditors, with or without notice. One who has performed labor for the mortgagor, for which he has not been paid, but having actual knowledge of an unrecorded chattel mortgage, is a creditor of the mortgagor therein, and entitled to priority over the mortgagee, although he has filed a subsequent laborer's lien against the property. The filing of such lien does not constitute him an "encumbrancer." (pp. 969, 970.)

LIENS—CLAIM FOR LABOR OF OTHERS.—A person who has a contract to do certain labor for another may file his laborer's lien therefor, and include therein the labor performed by himself and others hired and paid by him to assist in the work, if such hired labor does not change the contract or relations between the original parties. (p. 972.)

ACTIONS—OBJECTION TO PARTIES—WAIVER.—The objection that parties to the action are minors who appear without guardians ad litem cannot be raised after pleading to the merits. (p. 973.)

Tray & Falknor, for the appellants.

J. R. Mitchell, P. Skillman, and J. W. Robinson, for the respondents.

597 DUNBAR, J. This is an action on the part of the appellants to foreclose a mortgage upon both real and personal prop-

erty. The appeal herein involves the rights of appellants and respondents to the personal property described in appellants' mortgage. The personal property is described as the building used as a shingle-mill, together with the machinery specifically described, the same being situate on leased land in the town of Bucoda, Thurston county, state of Washington. The appellants' mortgage was executed by Rachel L. Clock and others, on the fourteenth day of November, 1896, for the sum of two thousand five hundred and fifty-seven dollars and twenty-four cents, and there is now due and owing upon the same two thousand two hundred and sixty-nine dollars and ninety-four cents, with interest and attorneys' fees. The mortgage was recorded in the auditor's office of Thurston county upon the eighteenth day of November, 1896, but the mortgage did not contain the affidavit of good faith, and was recorded as a real estate mortgage. The respondents, excepting the mortgagors, were employed in said mill described in the mortgage, which mill was being operated by a firm known as Clock & Sanford, and they performed work and labor and furnished material to said Clock & Sanford in the operation of said mill, for which they filed logger's liens upon the lumber and shingles at the mill, and also what are known as "employés' liens" upon said mill, under the law of 1897. These respondents were brought into the action. To the answer of respondent lienors the appellants replied, alleging actual knowledge of the appellants' mortgage. The court found that certain of the respondents, to wit, J. M. and M. J. Davies, Henry Richards, Ed. Enderland (who assigned his claim to Henry ⁵⁹⁸ Richards), Peter Anderson, Louis Hagoes, Samuel Southerland, A. Perry, Tony Cales, and Charles Whalen and each of them, had, at and prior to the doing of the work for which they claimed their liens actual knowledge and notice of appellants' mortgage, but also found that all of the respondents' claims were superior to those of the appellants, the mortgagees.

The first assignment of error is that the court erred in holding the employés act of 1897 constitutional. This question is eliminated from the case by the opinion of this court in *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147.

It is also alleged that the court erred in its conclusion of law that the respondents' liens were superior upon the property, after finding that the respondents had actual knowledge of appellants' unrecorded mortgage. The statute which is under construction here is section 4558 of Ballinger's Code, which

is as follows: "A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and encumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

There has been a controversy in this and other states in relation to the construction of this statute, but this court, in *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 Pac. 867, placed a construction upon the statute which it has since followed. It was there said: "We think the true interpretation to be given the section requires the transposition of the comma appearing after the word 'purchasers,' as found in said section, by placing it after the word 'mortgagor,' making the section read as follows: 'A mortgage of personal property is void as against creditors of the mortgagor, or subsequent purchasers ^{and} and encumbrances of the property for value and in good faith.' . . . Manifestly," said the court, "there are three classes of persons whose rights are defined by this section. They are: 1. Creditors of the mortgagor; 2. Subsequent purchasers; and 3. Parties in whose favor subsequent encumbrances of the property are made. As to the first class—creditors—the unrecorded mortgage is absolutely void. It is void, also, as to the two latter classes when they deal with the mortgaged property for value and in good faith. Subsequent purchasers and parties taking subsequent encumbrances upon the property are thus placed upon the same footing, and in all reasons why should they not be?"

It is insisted by the appellants that the lienors are subsequent encumbrancers; that they are not creditors of the mortgagor; and that their actual knowledge of the existence of the mortgage exempts them from the benefit of the section; and the above case is quoted in support of that contention. But we are inclined to think that in the third classification, viz., parties in whose favor subsequent encumbrances of the property are made the court did not have reference to parties in whose favor any encumbrances were made by operation of law, but to parties who took an encumbrance by virtue of a contract with the owner of the property, as a subsequent mortgagee, and encumbrances of that character. This view is sustained by the decision of this court in *Willamette Casket Co. v.*

Cross Undertaking Co., 1 Wash. 190, 40 Pac. 729, where, after quoting the statute, it was said: "If the language used be given its ordinary significance, it would seem to fully warrant such contention. It is claimed, however, by the respondent that only such creditors are protected by the provisions of this section as before the time of the recording of the mortgage have obtained some specific lien upon the property. But such construction would do violence to the language used. The statute makes no distinction as to the creditors who are ⁶⁰⁰ to be protected, and we see no good reason for holding that one class rather than another was intended. One is as much a creditor before his claim has been made a specific lien upon certain property as after, and for that reason an unsecured creditor is as well described by the language of the section as one who had procured a specific lien as security for his claim. The intention of the legislature was to protect those who should give credit upon the faith of property owned by one to whom it was extended, and to give force to such intention the term 'creditors,' as used in the act, must be held to cover all classes of creditors."

It is generally held that, where the statute does not restrict the word "creditor," the courts will not limit its application. A creditor and an encumbrancer may stand in a dual capacity; for an encumbrancer must, at least, be a creditor, although a creditor need not necessarily be an encumbrancer. It seems to us that the more reasonable and just construction of the law would be to construe the term "creditor" with reference to the inception of the obligation of the debtor, rather than to conditions which might afterward arise. For instance, if the lienors in this case had not seen fit to file their liens, but had relied upon their employer for compensation, they would unquestionably have been creditors. Because they afterward took advantage of the lien laws, the relative position to the employer ought not to be held to have been changed. It has even been held in *Dempsey v. Pforzheimer*, 86 Mich. 652, 49 N. W. 465, under a statute like ours, that where a creditor, who was entitled to the benefit of the statute, afterward entered into a voluntary agreement with his debtor by which he took a mortgage upon the property that had been before that mortgaged, but which had not been properly recorded, his relation as creditor had not been changed. The syllabus of the case is that "a creditor who has the right to secure ⁶⁰¹ a lien by legal process superior to that of a chattel mortgage then on file, because his debt was

contracted while the mortgage was withheld from record, may obtain a like lien by the execution to him by the debtor of a chattel mortgage to secure the same indebtedness after the filing of the first mortgage." In that case, Harris & Karpp, partners in the jewelry business, borrowed two thousand dollars of one Borgess, and gave a chattel mortgage upon the goods to secure such indebtedness. This mortgage was not properly recorded. Afterward a mortgage was given to respondent for a sum of money upon the same goods, the first mortgage not having been properly recorded. After holding that the mortgage was void for want of filing, as against the original indebtedness, the court said: "If the defendants, before taking their mortgage, and after the filing of the Borgess mortgage, had proceeded against the property so mortgaged, and obtained by any process of law a lien upon it, or had they obtained judgment upon their claim, and issued execution, and levied on it, there can be no doubt but such lien or levy would have been good as against the Borgess mortgage. But it is claimed on behalf of plaintiff that because defendants took a mortgage to secure the indebtedness to them after the Borgess mortgage was put on file, and therefore had notice of it, they cannot now claim the benefit of the rule adopted by this court as shown above, and that they have no standing under the statute upon which the rule is founded. It is contended that, to avail themselves of the statute, the defendants, at the time of seizing the goods in question, must have the standing either of 'creditors of the mortgagors,' or of 'subsequent purchasers or mortgagees in good faith'; that they cannot claim as subsequent mortgagees in good faith, because they took their mortgage with full notice of the Borgess mortgage, which had then been on record for four days; and that the benefit of the statute cannot be invoked in favor of creditors, except by those who have a lien by process of law upon the property ⁶⁰² in question. . . . But we can see no difference between a lien obtained by process and one gotten by consent of the owner through a chattel mortgage. If the defendants were entitled, as they undoubtedly were, to obtain a lien upon this property by legal process, and to hold it to the amount of such lien against the mortgage of Borgess, because the debt they were seeking to collect was contracted while this mortgage was withheld from record, we can see no reason in principle why they cannot hold the property under a lien obtained by chattel mortgage to secure the same indebtedness."

And so, in this case, the fact that the lienors, who at one time were creditors, have seen fit to accept the benefit of the law in relation to the collection of their claims, does not take them out of the category of creditors and place them in that of encumbrancers. If they should reduce their claims to a judgment and issue execution, and levy upon property of their employer, they would have an encumbrance upon the property; but it would not be argued for a moment that they would lose any rights by reason of the operation of the law in this respect, and it is by reason of the operation of the lien laws, and not by any contractual relations, that they have an encumbrance or lien upon the property of the employer. It cannot even be said that they originally intended to take advantage of the lien laws. Ordinarily, when a man works for another he expects to be paid for his labor without the expense, vexation, and delay attending the foreclosure of a lien, and he avails himself of the lien law as a last resort, if he avails himself of it at all. The lienor stands in an entirely different position from a person who originally contracts with reference to the security which he takes, and who would have no contractual relations with the debtor excepting for the security.

It is also insisted that these lienors are not creditors ⁶⁰⁸ of the mortgagor, for the reason that the mortgage was given, in the first place, by Rachel Clock and others, and that one Sanford has since obtained an interest in the operation of the mill. But we do not think this contention can be sustained in the face of the record. The finding of fact is to the effect that J. B. Clock, who was one of the original joint owners of the shingle-mill property, at about the time he formed a partnership with Sanford for the purpose of operating the mill purchased all the interests of his joint owners in and to the said shingle-mill property, and has all the time, during which the labor was performed, been the absolute owner of the mill property. It follows that Sanford has no interest that would in any way affect the lien on Clock's property.

The objection is raised that the lien claim of Egbert Martin comprises work that was done by his brother, and also included the claim of some hired men; and it is insisted that this claim cannot be sustained, under the doctrine announced in *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070, and *Campbell v. Sterling Mfg. Co.*, 11 Wash. 204, 39 Pac. 451. The court made the following finding in relation to Martin's lien: "That all of said shingle bolts mentioned were cut by said Eg-

bert Martin and his brother ——— Martin, equally and jointly, under agreement with said Clock & Sanford, and they were together entitled to the whole amount that was mentioned as due in said lien of Egbert Martin, but that said Egbert Martin, by mistake and honest error, and not intending to defraud anyone, liened or included in his lien the whole amount, instead of the half of said amount, and that his lien should have been only for the amount of seventy-three dollars and fifty-two cents; that in cutting said bolts on the ranch of Davis, as aforesaid, said Egbert Martin and his brother employed at their own expense and paid for assistance of four others to the amount of sixty-four dollars and twenty-five cents, altogether, in the cutting of all said bolts, without any contract ⁰⁰⁴ on the part of said hired help to and with said Clock & Sanford, and the same did not in any manner change or modify the agreed price per cord for cutting of said bolts—namely, eighty-five cents per cord.”

The lien was cut down to the extent of the amount claimed and earned by the brother of Egbert Martin. It is true that in some of the earlier cases of this court, notably *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070, it was held that the lien given by statute was personal to the laborer, and when the laborer combined with his own claim the one assigned by another laborer he lost all right to take benefit of the foreclosure. But in that case the lien assigned was a distinct lien, and the lienor claimed for both balances in the gross sum. In addition to the fact that the court of later years has been inclined to construe the lien laws more liberally in favor of lienors, in this case the lienor, Martin, had a contract for hauling all these shingles, and in no event could the labor employed change the contract price or change the relations between the employer and the lienor, and the case falls within the rule announced by this court in *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. 308, 39 Pac. 815, where was sustained a lien that was partly for labor furnished as distinguished from labor performed.

The lien of Charles Whalen falls squarely within the rule announced above, and the same may be said of the liens of James M. and Morgan J. Davies, the finding being that a certain sum was due for labor under the contract contained in the lien.

As to the objection to liens of Ray Clock and Tony Cales, on the grounds that they were minors, it is sufficient to say that the objection, not being raised until the trial of the case, came too late; and “when an infant, without the intervention of a

guardian or next friend, ⁶⁰⁵ undertakes to prosecute his suit in his own name, the debtor has a right to object to his recovery, because the judgment, like the contract, may be repudiated, or affirmed and enforced at the election of the infant, if rendered before his majority. . . . But such objection must be interposed in apt time [by plea in abatement or by answer] before the trial on the merits, and if not so pleaded, it will be considered as waived": *Hicks v. Beam*, 112 N. C. 642, 34 Am. St. Rep. 521, 17 S. E. 490.

"After pleading to the merits the objection cannot be raised, for the defendant is deemed to have thereby admitted that the plaintiff is *rectus in curiae*": 14 Ency. of Pl. & Pr. 1019, and cases cited.

The judgment is in all respects affirmed.

Reavis, C. J., and Fullerton, Anders, Mount and Hadley, JJ., concur.

WHITE, J. If called upon to interpret, as an original construction, section 4558 of Ballinger's Code, I could not concur in this opinion. Inasmuch, however, as this court has held that a mortgage of personal property, unless executed and recorded in the manner provided by law, is void, as against creditors, with or without notice, I concur; for I think the mere fact that one avails himself of a lien given to him by law does not constitute him a mere encumbrancer.

A Chattel Mortgage is Void, even as to creditors with notice, if it is neither acknowledged, recorded, nor accompanied by a delivery to the mortgagee of the property: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, 49 N. E. 592. The mortgage must be recorded, or the property delivered to the mortgagee: *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 460, 45 N. E. 760. Though it has often been held that actual notice of a mortgage dispenses with the necessity of constructive notice by recordation: *Union Nat. Bank v. Olum*, 3 N. Dak. 193, 44 Am. St. Rep. 533, 54 N. W. 1034; note to *Brown v. James H. Campbell Co.*, 21 Am. St. Rep. 283. See, also, *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178, 73 Am. St. Rep. 678, 54 N. E. 781.

If an Infant Prosecutes a Suit in his own name, without the intervention of a guardian or next friend, an objection thereto must be interposed in apt time by plea in abatement, or by answer before the trial on the merits. If not so pleaded, it will be considered as waived: *Hicks v. Beam*, 112 N. C. 642, 34 Am. St. Rep. 521, 17 S. E. 490.

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11. **COTENANCY—ADVERSE POSSESSION.**—If a stranger goes into possession of land under a recorded deed from a cotenant purporting to convey an absolute and exclusive title to the entire interest in the land, this constitutes an ouster of the other cotenants not laboring under any disability, and the grantee's possession may be adverse as to them from the time of its commencement. (*Sudduth v. Sumeral*, 883.)

ALTERATION OF INSTRUMENTS.

1. **APPEAL—PRESUMPTION.**—On the admission of a note in evidence by the lower court, the presumption is that there were no alterations in it requiring explanation, and in the absence of the original note it cannot be determined by the superior court whether or not such admission was an error. (*Merritt v. Boyden*, 246.)

2. **EVIDENCE OF THE ALTERATION OF OTHER NOTES** of same party is rightly refused where it is not claimed that the holder of an altered note ever held or was aware of any such other notes. (*Merritt v. Boyden*, 246.)

See Negotiable Instruments, 10-17.

APPEAL AND ERROR.

1. **APPEAL—LAW OF THE CASE.**—A decision which simply determines that a judgment was void, because obtained by fraudulent collusion with the sheriff, cannot be regarded as the law of the case, on a subsequent appeal from a judgment on another trial, in which it was found that there was no such collusion, and that the service and return were made in good faith. (*Bennett v. Wilson*, 207.)

2. **APPELLATE PRACTICE—OBJECTIONS TO EVIDENCE NOT RULED** upon at the trial cannot be urged in the appellate court. (*Youngblood v. South Carolina etc. R. R. Co.*, 824.)

3. **APPELLATE PRACTICE—EXCEPTIONS NOT PROPERLY TAKEN** are waived on appeal. (*State v. Saldell*, 627.)

4. **APPELLATE PRACTICE—INSTRUCTIONS.**—Error cannot be predicated upon the failure of the trial court to charge the jury upon particular propositions, when no request to charge thereon was made. (*Sudduth v. Sumeral*, 883.)

5. **APPEAL—THE APPELLATE COURT'S ACTION**, when not assigned as for error, is not subject to review on appeal to supreme court, (*Peterson v. Gibson*, 263.)

6. **APPELLATE PROCEDURE—NEW TRIAL, ORDER GRANTING—WHEN NOT REVIEWABLE.**—An order granting a new trial in an action tried by a jury, where there is a conflict in the evidence, and the order may have been upon the facts, is not reviewable, unless it appears by the record that the order was affirmed as to the facts or the appeal therefrom dismissed. (*Bank of China etc. v. Morse*, 676.)

7. APPEAL—REVERSAL OF JUDGMENT—AMENDMENT OF COMPLAINT.—A judgment will not be reversed because a special demurrer to the complaint on the ground of ambiguity was improperly overruled, where the complaint could easily have been amended, and the defendants were not injured. (*Olsen v. Birch*, 215.)

APPRENTICES.

See Injunctions.

ARBITRATION.

1. ARBITRATION NOT A CONDITION PRECEDENT.—Unless a provision for arbitration expressly stipulates that until arbitration no action shall be brought, its performance is not precedent to the right to sue on the contract. (*Fisher v. Merchants' Ins. Co.*, 428.)

2. ARBITRATION A CONDITION PRECEDENT.—When a contract provides that no action upon it shall be maintained until arbitration and award, the award is a condition precedent to the right of action. (*Fisher v. Merchants' Ins. Co.*, 428.)

See Insurance, 2.

ASSAULT.

See Intoxicating Liquors, 1.

ATTACHMENT AND GARNISHMENT.

1. ATTACHMENT.—IF A CONVEYANCE IS FRAUDULENT and void as to creditors, the title is regarded as remaining in the grantor, and a judgment creditor by levy acquires such seisin as enables him to maintain a real action against the fraudulent grantee. (*Stickney etc. Coal Co. v. Goodwin*, 408.)

2. NEGOTIABLE INSTRUMENTS — GARNISHMENT.—The purchaser before maturity of a negotiable note, made and payable in the state by parties residing therein, takes it subject to attachment when the payor has, before the transfer, been summoned as the trustee of the payee. (*Cox v. Severance*, 602.)

3. EXEMPTIONS.—DAMAGES RECOVERABLE FOR CONVERSION OF EXEMPT PROPERTY may be reached by trustee process, in the hands of the judgment debtor. (*Robinson v. Burke*, 595.)

4. EXEMPTIONS—WAGES.—Wages for labor performed by defendant after service upon the trustee are not exempt from attachment if they are inseparable from the other indebtedness of the trustee which is not exempt. (*Gray v. Fife*, 603.)

See Bankruptcy.

ATTORNEY AND CLIENT

See Evidence, 4.

ATTORNEYS' FEES.

See Constitutional Law, 47.

BAILMENT.

1. BAILMENT — SAFE DEPOSIT — CARE REQUIRED OF BAILEE.—When a box, in a safe deposit vault is rented, the relation

between the parties is that of bailor and bailee. The latter is bound to exercise ordinary care in the preservation of the property, unless it has been waived by special agreement. (*Cussen v. Southern Cal. Sav. Bank*, 221.)

2. **BAILMENT—SAFE DEPOSIT—WAIVER OF ORDINARY CARE.**—An agreement, by a bank, in renting a box in its safe deposit vault, that it shall not be liable further than to use diligence that no unauthorized person shall be admitted to any rented safe, simply fixes the degree of care to be used in identifying parties, and is not a waiver of that degree of care imposed by law upon a bailee for hire. (*Cussen v. Southern Cal. Sav. Bank*, 221.)

3. **BAILMENT—LOSS OF SAFE DEPOSIT.**—If the money of a person who has rented a box in a safe deposit vault is abstracted while on deposit therein, and he sues for its recovery, he makes out a prima facie case by showing the deposit and its subsequent loss. The burden of proof is then cast upon the defendant of showing that it used proper care in the safekeeping of the plaintiff's property. (*Cussen v. Southern Cal. Sav. Bank*, 221.)

4. **BAILMENT—SAFE DEPOSIT.—NEGLIGENCE IN GUARDING** a deposit in a safe deposit vault is established by evidence that the bailee failed to turn over to the renter of the box both of the keys which unlocked it; and that the money was abstracted from the box while the vault was in the charge of boys, who were paid small salaries and of whose honesty the defendant was ignorant. (*Cussen v. Southern Cal. Sav. Bank*, 221.)

5. **BAILMENT—SAFE DEPOSIT COMPANY—LIABILITY OF, FOR NEGLIGENCE AND ITS EXTENT.**—A statute declaring that "the liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth" does not shield a safe deposit company from liability for the actual value of a deposit lost by its negligence, as such statute is inapplicable by reason of the peculiar nature of the safe deposit business. (*Cussen v. Southern Cal. Sav. Bank*, 221.)

See Pledge; Trover, 9, 10.

BALLOTS.

See Elections.

BANK DEPOSIT.

See Gifts.

BANKRUPTCY.

BANKRUPTCY.—AN ATTACHMENT OF REAL ESTATE is not dissolved by proceedings in bankruptcy begun by the defendant more than four months thereafter. (*Stickney etc. Coal Co. v. Goodwin*, 408.)

BASTARDY PROCEEDINGS.

1. **EVIDENCE.—THE COMPARISON OF A CHILD WITH THE DEFENDANT** in bastardy proceedings, as an individual, or with his race, is properly allowed on the issue of establishing the paternity of the child. (*State v. Saidell*, 627.)

2. **BASTARDY.—EVIDENCE TO REFUTE INSINUATIONS** against complainant's character in bastardy proceedings is competent. (*State v. Saidell*, 627.)

8. BASTARDY—EVIDENCE—TIME OF ACCUSATION.—Evidence elicited to show that the accusation made by the complainant against the defendant in a bastardy proceeding was an afterthought may be rebutted by evidence showing when and under what circumstances the accusation was first made. (*State v. Saidell*, 627.)

BENEFIT SOCIETIES.

1. BENEFIT SOCIETIES—RIGHTS OF BENEFICIARY.—As a general rule, the beneficiary does not acquire a vested right to mortuary fund, but, during the member's lifetime, a mere expectancy, subject to defeat by the power of appointment vested in him. (*Peterson v. Gibson*, 263.)

2. BENEFIT SOCIETIES.—THE CONSTITUTION IS IN NO SENSE THE CHARTER, but merely a code of laws adopted by the association. (*Peterson v. Gibson*, 263.)

3. BENEFIT SOCIETIES—BY-LAWS, EFFECT OF CHANGES IN.—The contract of membership cannot be impaired by subsequent enactments or change in by-laws unless the member, in express terms, has agreed to be bound by such enactments or changes as may thereafter be enacted. (*Peterson v. Gibson*, 263.)

4. BENEFIT SOCIETY — BY-LAWS.—POWER TO AMEND constitution and by-laws is passed by association as an attribute of its corporate life. (*Peterson v. Gibson*, 263.)

5. BENEFIT SOCIETY — AMENDMENT OF BY-LAWS.—A clause in by-laws providing for amendment does not constitute an express agreement to be bound by such amendment where the same takes away a vested right or impairs an original obligation. (*Peterson v. Gibson*, 263.)

6. BENEFIT SOCIETY—EXECUTOR'S INTEREST.—A benefit certificate payable to the devisees of the certificate holder as provided in his last will and testament is payable to the person named in such will, and not to the executor. (*People v. Petrie*, 268.)

BICYCLES.

See Highways, 8.

BILL OF PARTICULARS.

CRIMINAL LAW—BILL OF PARTICULARS.—It is only when it appears that defendant cannot properly prepare his defense without a bill of particulars, that the court will require the prosecuting attorney to furnish it. (*Kelly v. People*, 323.)

BILLS AND NOTES.

See Negotiable Instruments.

BOND FOR DEED.

See Deeds, 4, 5.

BOUNDARIES.

BOUNDARIES, WHEN DO NOT EXTEND TO THE MIDDLE OF A STREET.—IF A MUNICIPAL CORPORATION HAVING TITLE TO THE FEE OF A STREET conveys lands as bounded by and upon it, the conveyance does not extend to the mid-

ble, but is limited to the line of the street, because the legal intentment is that it is to remain a public highway. (Graham v. Stern, 694.)

BROKER'S COMMISSION.

BROKER'S COMMISSION—DEFERRED PAYMENTS.—

Where a real estate broker agrees to accept his commission in proportionate amounts, from time to time, as the deferred purchase money is paid, and default is made in payment of such purchase money and foreclosure had, he becomes at once entitled to commission upon the amount realized from the foreclosure sale, not in excess of the balance due him, and whether the property is bought in by his principal or sold to a stranger. (Crane v. Eddy, 284.)

CARRIERS.

See Trover, 6-8; Railroads.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGES—CREDITORS—PRIORITIES.—

A chattel mortgage, unless executed and recorded in the manner provided by statute, is void as against creditors, with or without, notice. One who has performed labor for the mortgagor, for which he has not been paid, but having actual knowledge of an unrecorded chattel mortgage, is a creditor of the mortgagor therein, and entitled to priority over the mortgagee, although he has filed a subsequent laborer's lien against the property. The filing of such lien does not constitute him an "encumbrancer." (Blumauer v. Clock, 906.)

2. SALE BY MORTGAGOR—WARRANTY.—If a mortgagor, in pursuance of an agreement with the mortgagee, sells mortgaged chattels, his representations and warranties as to their condition bind the mortgagee. (National Citizens' Bank v. Ertz, 438.)

3. IF A MORTGAGOR OF CHATTELS IN POSSESSION SELLS and delivers the property, he is guilty of conversion. (Dean v. Cushman, 425.)

4. A BONA FIDE PURCHASER OF A MORTGAGED CHATTEL of the mortgagor in possession obtains a right of possession, except as against the mortgagee, and a right to redeem it. (Dean v. Cushman, 425.)

5. A BONA FIDE PURCHASER OF MORTGAGED CHATTELS of the mortgagor in possession, if he merely receives them into his possession and exercises no dominion over them to the exclusion of the mortgagee, or in defiance of his rights, is not liable for a conversion, without demand or refusal. (Dean v. Cushman, 425.)

CONFESSION OF JUDGMENT.

See Judgments, 1-8.

CONFLICT OF LAWS.

See Corporations; Evidence, 8; Husband and Wife, 8; Insolvency; Judgments, 9-13; Jurisdiction; Limitation of Actions, 8.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—TITLE OF STATUTE.—An act entitled "To authorize municipal and other subdivisions of the

state to buy and sell spirituous, vinous, and malt liquors, and to further regulate or prohibit the sale of such liquors," embraces but one subject—namely, the exclusive sale of liquors by municipalities. (*Sheppard v. Dowling*, 68.)

2. **LEGISLATURE—SOURCE OF POWER OF.**—The constitution is not the source of the powers of a state legislature, but only limitations thereon, and apart from such limitations the power of the legislature has no bounds. (*Sheppard v. Dowling*, 68.)

3. **CONSTITUTIONAL LAW.—IT IS THE DUTY OF ONE DEPARTMENT OF GOVERNMENT** to presume that another has acted within its legitimate province. (*State v. Rogers*, 395.)

4. **CONSTITUTIONAL LAW—RIGHT TO SPEEDY TRIAL.**—A party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important, or to prolong his imprisonment, without such trial, beyond the time provided by law. (*In re Begerow*, 178.)

5. **STATUTE FIXING REASONABLE TIME FOR BRINGING TO TRIAL—CONSTRUCTION OF.**—A statute providing that the court must, unless good cause is shown to the contrary, order a prisoner to be discharged, where he has not been brought to trial within sixty days after the filing of the indictment or information, if it has not been postponed upon his application, fixes a reasonable time in which a defendant shall be brought to trial, and is mandatory. (*In re Begerow*, 178.)

6. **CONSTITUTIONAL LAW.—IF THE PROPER CONSTRUCTION** of a statute is doubtful, courts must resolve the doubt in favor of the validity of the law. (*Arms v. Ayer*, 357.)

7. **CONSTITUTIONAL LAW.—LAWS MUST BE COMPLETE** in all their terms and provisions when they leave the legislative branch of the government, and nothing must be left to the judgment of the delegate of the legislature. (*Arms v. Ayer*, 357.)

8. **CONSTITUTIONAL LAW—DELEGATION OF POWERS.**—The fact that the inspector of factories is given a discretion as to the number, location, material, and construction of fire-escapes in buildings under a statute relating thereto does not render it unconstitutional as delegating legislative or judicial power to such inspector. (*Arms v. Ayer*, 357.)

9. **JUDICIAL POWER UNDER STATUTES** is never extended to cases of the exercise of judgment in the execution of a ministerial power. (*Arms v. Ayer*, 357.)

10. **CONSTITUTIONAL LAW—TITLE OF STATUTES.**—A constitutional provision requiring statutes to embrace in their title but one subject, which shall be expressed in the title, is complied with if the general object of an act is so expressed. It is not to be expected, nor is it possible, for the title of the act to contain all the various provisions of the act itself. If such were the case, the title of the act would have to be as comprehensive as the act itself. (*Arms v. Ayer*, 357.)

11. **CONSTITUTIONAL LAW—FIRE-ESCAPES—GENERAL LAW.**—A statute providing that all buildings "four or more stories in height, excepting such as are used for private residences exclusively," and "that all buildings more than two stories in height used for manufacturing purposes" shall have fire-escapes, is a general, and not a local or special, law. (*Arms v. Ayer*, 357.)

12. **CONSTITUTIONAL LAW—SPECIAL LEGISLATION.**—It is sufficient, under a constitutional provision prohibiting local or

special legislation, if a law applies to all persons in like situation, and to all subjects of the same class or degree. (*Arms v. Ayer*, 357.)

13. **CONSTITUTIONAL LAW—DENIAL OF EQUAL PRIVILEGES.—AN AMENDMENT TO A COLLATERAL INHERITANCE TAX LAW**, undertaking to exempt resident nephews and nieces, violates section 2, article 4, of the federal constitution, concerning equal privileges and immunities, and also section 1978 of the United States Revised Statutes, concerning an equal right to inherit property. All nieces and nephews therefore remain subject to the tax as they were before the attempted amendment. (*Estate of Mahoney*, 155.)

14. **CONSTITUTIONAL LAW—MORTGAGE FORECLOSURE—HOMESTEADS.—A statute** providing that, in case of any homestead occupied for that purpose at the time of foreclosure or execution sale thereof, the judgment debtor shall have the right of redemption without accounting for issues or value of occupation, is unconstitutional when applied to a foreclosure sale under a mortgage executed prior to its passage and under a statute giving the foreclosure purchaser the right of possession from the day of sale. (*Canadian etc. Trust Co. v. Blake*, 946.)

15. **CONSTITUTIONAL LAW.—A STATUTE WHICH FORBIDS THE SALE OF CREAM** that contains less than twenty per centum of fat is constitutional. (*State v. Crescent Creamery Co.*, 464.)

16. **PURE FOOD LAW—INTERSTATE COMMERCE.—A statute** which prohibits the manufacture and sale of "any substance or compound made in imitation of yellow butter," and not made "wholly of cream or milk," is constitutional, though intended to prohibit the sale of such products imported from other states and sold in the original packages. (*State v. Rogers*, 395.)

17. **CONSTITUTIONAL LAW.—A TAX UPON EMIGRANT AGENTS**—that is, persons hiring laborers to be employed in another state—is neither a restriction upon interstate commerce nor an interference with the freedom of contract. (*State v. Hunt*, 758.)

18. **POLICE POWER.—THE BUSINESS OF AN EMIGRANT AGENT** is of such a nature and importance as to justify the exercise of the police power in its regulation. (*State v. Hunt*, 758.)

19. **CONSTITUTIONAL LAW—TAXING TRADES.—AN EMIGRANT AGENT** who hires laborers to be employed in another state is, within the meaning of the North Carolina constitution, exercising a trade or profession, upon which a tax may be properly levied. (*State v. Hunt*, 758.)

20. **CONSTITUTIONAL LAW—CONFERRING POWERS ON MUNICIPALITIES—CHARTERS.—The legislature** may confer additional powers on municipalities by original acts which contain no reference to existing municipal charters. (*Sheppard v. Dowling*, 68.)

21. **CONSTITUTIONAL LAW—CREATING OR RENEWING CHARTER—MUNICIPAL CORPORATIONS.—An act** conferring upon municipal corporations the power to deal in liquors does not create, renew, or extend their corporate charters within the meaning of a constitutional provision prohibiting such a law. (*Sheppard v. Dowling*, 68.)

22. **CONSTITUTIONAL LAW — EXTENDING CHARTER.—A constitutional provision** prohibiting the extension of the charter of more than one corporation has reference solely to time, and not at all to additional powers. (*Sheppard v. Dowling*, 68.)

23. CONSTITUTIONAL LAW—MUNICIPALITIES—CREATING, RENEWING AND EXTENDING CHARTER.—A constitutional provision prohibiting laws which shall create, renew, or extend the charter of more than one corporation has no application to municipalities, but only to private corporations. (*Sheppard v. Dowling*, 68.)

24. CONSTITUTIONAL LAW—CORPORATE POWERS—MUNICIPALITIES.—A constitutional provision prohibiting corporations from engaging in any business not expressly authorized by their charters applies solely to private corporations. (*Sheppard v. Dowling*, 68.)

25. CONSTITUTIONAL LAW—POWERS CONFERRED BY CHARTER.—A power conferred upon a corporation by an independent act is a power conferred by its charter. (*Sheppard v. Dowling*, 68.)

26. CONSTITUTIONAL LAW.—MUNICIPAL CORPORATIONS have no vested rights in their offices, their charters, their corporate powers, or even in their corporate existence. (*Commonwealth v. Moir*, 801.)

27. CONSTITUTIONAL LAW—LEGISLATION—MOTIVE OF. In enacting legislation as to municipal corporations the fact that the action of the state toward its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens is not one which can be made the basis of action by the judiciary, nor can the motives of the legislators, real or supposed, be considered. (*Commonwealth v. Moir*, 801.)

28. CONSTITUTIONAL LAW—IMPERFECTION OF ACT AS TO MUNICIPAL CORPORATIONS.—The fact that an act in relation to cities of the second class is imperfect and operates with great inconvenience, because of serious difficulties presented in regard to the passage of ordinances, does make it unconstitutional. (*Commonwealth v. Moir*, 801.)

29. CONSTITUTIONAL LAW.—THE CLASSIFICATION OF CITIES is a legislative, not a judicial, question. It is based on a difference of municipal affairs, and so long as it relates to, and deals with, such affairs, the questions of where the lines shall be drawn as to cities varying in population, and what differences of system shall be prescribed for differences of situation, are wholly legislative. (*Commonwealth v. Moir*, 801.)

30. CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENTS—SCHEDULE.—The substitution of a new form of city government is always accompanied by some shifting of officers and duties, and some inconvenience, and to reduce this to a minimum, by temporary adjustment of the changes, is the province of a schedule. Hence, in legislation which involves such a change, a schedule of temporary expedients is usually and properly added, and the expedients provided would need to be very clearly unconstitutional, to justify a court in overturning them. (*Commonwealth v. Moir*, 801.)

31. CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENT AS TO OFFICE OF RECORDER.—An act in relation to cities of the second class is not unconstitutional by reason of the temporary expedients contained in the schedule thereto, that a recorder shall be appointed in each of the "existing" cities of the second class, and that he shall hold office for a time which passes over an election. (*Commonwealth v. Moir*, 801.)

32. CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENT AS TO CLASS—LOCAL ACT.—A temporary provision in the schedule of an act relating to cities of the second class, which applies to all the present members of the class, meets all the requirements of the temporary situation and ends with the end of that situation. It does not, therefore, make the whole act local or special. (*Commonwealth v. Moir*, 801.)

33. CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENT—ELECTION OF RECORDER.—There is no constitutional right of election in reference to the office of the chief executive of a city of the second class, called a recorder. The legislature, in changing the city government, may make such office permanently appointive, and what it can do permanently it may do temporarily. (*Commonwealth v. Moir*, 801.)

34. CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENTS.—MUCH LEGISLATIVE LATITUDE must be allowed to temporary measures incident to the adjustment of changes in a municipal system of government. (*Commonwealth v. Moir*, 801.)

35. CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—TEMPORARY EXPEDIENTS—TIME OF ACTS GOING INTO EFFECT.—It is desirable, but not essential, that an act making important changes in a city government should provide definitely when it shall go into effect. Hence, an act in relation to cities of the second class, which abolishes the office of mayor and substitutes that of recorder, is not unconstitutional because it vests in the governor the discretion of determining when it shall become operative by the appointment of a recorder. (*Commonwealth v. Moir*, 801.)

36. CONSTITUTIONAL LAW—CHANGE IN CITY GOVERNMENT—ABOLITION OF MAYOR'S OFFICE.—There is no right to a public office unless it is under the express protection of the constitution, and such protection is nowhere given to municipal officers. Hence, the legislature, in substituting a new form of city government for an old one, has power to abolish the elective office of mayor and to substitute therefor the office of recorder. (*Commonwealth v. Moir*, 801.)

37. CONSTITUTIONAL LAW—ABOLITION OF MUNICIPAL OFFICES.—As a municipal office may be abolished by the legislature by a change of the charter, the question how great or how small the changes by the new charter shall be, and to what particulars they shall apply, is one wholly for legislative consideration. (*Commonwealth v. Moir*, 801.)

38. CONSTITUTIONAL LAW—STATUTE VOID IN PART.—A subordinate and severable feature of an act, though void, does not invalidate the remainder of it. (*Commonwealth v. Moir*, 801.)

39. CONSTITUTIONAL LAW.—APPOINTMENTS TO MUNICIPAL OFFICES need not be confirmed by the senate. (*Commonwealth v. Moir*, 801.)

40. CONSTITUTIONAL LAW—STATUTES—EXPRESSION OF SUBJECT IN TITLE.—The repeal of previous acts on the same general subject is always germane to the title of an act. (*Commonwealth v. Moir*, 801.)

41. CONSTITUTIONAL LAW—STATUTES VOID IN PART.—INVALID ARTICLES OF A STATUTE relating to cities does not

nullify the remainder, where it is an independent and easily severable provision. (Commonwealth v. Moir, 801.)

42. CONSTITUTIONAL LAW—MUNICIPAL AFFAIRS—UNIFORMITY.—The constitution of Pennsylvania does not require uniformity of legislation with respect to municipal matters, but it does require that laws on certain subjects shall not be local or special, and this means that they must be general. The "uniformity" discussed in the decisions of that state is not a necessary requirement, but only a test of the generality commanded by the constitution. (Commonwealth v. Moir, 801.)

43. CONSTITUTIONAL LAW—CLASSIFICATION OF CITIES—LOCAL OR SPECIAL LEGISLATION.—The principle of classification of cities is not a departure from correct constitutional construction, and an act in relation to cities of the second class is not an abuse of the power of classification, although it was intended to apply only to three existing cities, nor is it unconstitutional on the ground of being local or special legislation. (Commonwealth v. Moir, 801.)

44. CONSTITUTIONAL LAW—MUNICIPALITIES—LEGISLATIVE CONTROL OF.—The control of the general subject of municipal administration is a necessary governmental power, which has been left by the Pennsylvania constitution of 1874, where it has always been, in the legislature, although that constitution contains a binding code of particulars and details, which stand in the path of much just, desirable, and necessary legislation. (Commonwealth v. Moir, 801.)

45. CONSTITUTIONAL LAW — STATUTES — VIOLATING SPIRIT OF CONSTITUTION.—Courts are not at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words. If the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, the courts cannot declare a limitation under the notion of having discovered something in the spirit of the constitution which is not even mentioned in the instrument. (Commonwealth v. Moir, 801.)

46. CONSTITUTIONAL LAW—LOCAL SELF-GOVERNMENT. Although the constitution of Pennsylvania displays a strong intent, by many expressed prohibitions, to limit the power of the legislature with reference to interference in local affairs, yet the act of March 7, 1901, entitled "An act for the government of cities of the second class," does not violate the provisions of that instrument which preserve local self-government to the people. (Commonwealth v. Moir, 801.)

47. CONSTITUTIONAL LAW.—A STATUTE IMPOSING A LIABILITY UPON A CITY for the reasonable expenses or counsel fees paid or incurred by any of its officers in successfully defending against a proceeding to remove him from office, or to convict him of a crime, violates that provision of the constitution declaring that no county, city, town, or village shall give any moneys or lend its name or credit in aid of any individual or corporation, nor be allowed to incur any indebtedness except for a county, city, town, or village purpose. (Matter of Chapman v. New York, 661.)

See Highways; Intoxicating Liquors; Officers; Shipping.

CONTRACTS.

1. CONTRACTS—READING BEFORE EXECUTION.—A person who is sui juris cannot release himself from the payment of a

note or other contract in the absence of fraud, misrepresentation, trick, or concealment, on the ground that he did not read the contract before he signed it, if he had full opportunity to read it and deliberately signed it. (Crim v. Crim, 521.)

2. UNSEALED CONTRACTS.—APART FROM THE STATUTE OF FRAUDS, there is no distinction between unsealed written and oral contracts. Whether written or spoken, they are in law, if not sealed, equally and only parol contracts. (Emerson v. Shores, 404.)

3. CONTRACT—CONSTRUCTION OF.—IF A NEWSPAPER agrees to examine a plan to increase its advertising business, and if it should make use thereof to pay the originator a certain percentage "on gross receipts for all classified advertising run" during certain periods, the percentage is to be computed only on the increased volume of business attributable to the use of the plan. (Taylor v. Times Newspaper Co., 473.)

4. DIFFERENT WRITINGS CONSTITUTE BUT ONE INSTRUMENT if executed contemporaneously, and one is the consideration for the other. Each must be read as though it referred to the other and expressly incorporated its terms. (Downing v. Rademacher, 160.)

5. CONTRACTS IN RESTRAINT OF TRADE—WHEN VALID. Contracts in partial restraint of trade which the law sustains are those entered into by a vendor of a business with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. (Tuscaloosa Ice Mfg. Co. v. Williams, 125.)

6. RESTRAINT OF TRADE—UNREASONABLE.—THE MERE COVENANT on the part of a manufacturer not to continue his business, the sole consideration being the payment of money for the obligation itself, the business not being sold, is unreasonable and vicious as being in restraint of trade, since neither its purpose nor effect is to protect the covenantee in the enjoyment of a business which he has purchased. (Tuscaloosa Ice Mfg. Co. v. Williams, 125.)

See Evidence, 1.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Deeds; Vendor and Vendee.

CONVICT LABOR.

See Negotiable Instruments, 9; State Prison.

CORPORATIONS.

1. CORPORATIONS—RIGHT TO USE STREETS.—The right of a corporation to use the streets of a city under an ordinance is a mere license, but becomes a contract when the corporation accepts the privileges and enters upon the use of the streets. Such contract cannot be revoked except for cause. (People v. Central Union Tel. Co., 338.)

2. A CORPORATION HAS NO POWER TO PURCHASE ITS OWN STOCK, if the purchase is made with intent to injure its

creditors or to defeat them in the collection of their claims, or if it has such effect. (Hall v. Henderson, 53.)

3. CORPORATIONS—TRANSFER OF STOCK TO—INSOLVENCY.—If a stockholder in a corporation transfers his stock thereto, directly or indirectly, and knowingly receives corporate assets therefor, it is immaterial in a creditor's suit on a judgment against the corporation whether the latter was solvent at the time of the transfer, as such transfer is void against creditors in any event. (Hall v. Henderson, 53.)

4. CORPORATIONS—TRANSFER OF STOCK TO—NOTICE.—If an officer in a corporation sells his stock therein, taking notes in payment which are paid by checks drawn by other officers in the corporation and signed by them in their official capacity, and known by the seller to be such officers, he is chargeable with notice that he was receiving funds of the corporation in payment for his stock. (Hall v. Henderson, 53.)

5. CORPORATIONS—OFFICERS—DERELICTION OF DUTY. An officer in a corporation whose duty it is to make entries in its books cannot, as against creditors of the corporation, avoid the probative effect of such entries by invoking his own dereliction of duty. (Hall v. Henderson, 53.)

6. CORPORATIONS—DIRECTORS—PRESUMPTIONS AGAINST.—The directors of a corporation, so far as the rights of third parties are concerned, are conclusively presumed to know its financial condition, its business, its receipts and expenditures, and all the general facts which go to make up its condition and business, as shown by the entries on its regular books. (Hall v. Henderson, 53.)

7. CORPORATIONS—CONTRACT OF DIRECTOR WITH—VALIDITY OF.—A director's contract with his corporation is voidable at the instance of his beneficiary, but it is not void. To avoid it, injury must be shown. (Copsey v. Sacramento Bank, 238.)

8. CORPORATIONS—LIABILITY OF DIRECTORS TO ACCOUNT FOR THE CONSEQUENCES OF THEIR WRONGS.—The directors of a corporation are charged with the duties of trustees, are bound to care for its property and manage its affairs in good faith, and, for a violation of these duties resulting in waste of its assets, injury to the property, or unlawful gain to themselves, they are liable to account in equity the same as other trustees. (Bosworth v. Allen, 667.)

9. CORPORATIONS—DIRECTORS' LIABILITY TO ACCOUNT.—FOR THE PROCEEDS OF THEIR CONSPIRACY to dispose of their shares, to resign from their office, and to turn the corporation and its property over to irresponsible persons, the directors are liable to account both for the amount by them received in excess of the value of their stock and for the losses resulting to the corporation from the wrongful acts of their successors. (Bosworth v. Allen, 667.)

10. CORPORATION—DIRECTORS—JOINDER OF CAUSES OF ACTION AGAINST.—In a suit against former directors of a corporation who, in pursuance of a conspiracy, dispose of their shares, resign their office, and turn over the corporation and its property to irresponsible directors who are elected in their stead, recovery may be had in a single action for all the consequences of such conspiracy, including the moneys received by such directors, losses in the management of their successors, and the setting aside of con-

tracts made by them. The cause of action is the wrongful conspiracy, however numerous may be its results. (*Bosworth v. Allen*, 667.)

11. CORPORATIONS—CALLS BY, WHEN MAY BE RESISTED. A call made by the directors of a corporation or by a court, where there is not personal service of process on the stockholders, is not conclusive evidence of its own necessity, and may be resisted by them if the purpose for which it was made was illegal and unauthorized, without first having it vacated by judicial proceedings. (*Bank of China etc. v. Morse*, 676.)

12. CONFLICT OF LAWS.—THE PROCEDURE IN AN ACTION TO ENFORCE A CALL MADE AGAINST THE STOCKHOLDERS OF A FOREIGN CORPORATION is controlled by the law of the forum. (*Bank of China etc. v. Morse*, 676.)

13. CORPORATION—RIGHT OF TO MAKE CALLS TO BE PAID TO A NEW CORPORATION.—Under the English companies' act authorizing the organization of a new corporation and the transfer to it of the business and property of an old one, there can be no transfer to the former of the right to enforce calls against stockholders of the old corporation made for the purpose of procuring moneys to be paid into the treasury of the new one. The old corporation can transfer to the new nothing but the money and property in its possession when the proceeding to wind up is commenced. (*Bank of China etc. v. Morse*, 676.)

14. CORPORATIONS—PROCEEDINGS ON WINDING UP—WHEN NOT JUDICIAL.—Although the voluntary winding up of a corporation is subject to the supervision of a court, this does not make the proceeding judicial so as to be binding on the stockholders, when not authorized by law. (*Bank of China etc. v. Morse*, 676.)

15. CORPORATIONS—THE CALLS UPON STOCKHOLDERS MUST NOT BE UNEQUAL as to those of the same class. Hence, if it is proposed to wind up one corporation and form another, to which the property of the first is to be transferred, the call cannot subject to a greater liability those stockholders who do not take stock in the new corporation. (*Bank of China etc. v. Morse*, 676.)

16. CORPORATIONS.—CALLS UPON STOCKHOLDERS MUST NOT BE EXCESSIVE. Hence, if, upon proceeding to wind up a corporation, calls are made upon its stockholders greater than necessary to pay its liabilities, they may be successfully resisted. (*Bank of China etc. v. Morse*, 676.)

17. JURISDICTION — CORPORATIONS — NONRESIDENT STOCKHOLDERS.—The English companies' act is not extraterritorial, and binds only the persons within the jurisdiction to which the act extends, and no proceeding under it can impose a liability on the stockholders not resident, nor served with process, within that country. (*Bank of China etc. v. Morse*, 676.)

18. CORPORATIONS, FOREIGN — COMITY IN ENFORCEMENT OF CALLS.—A supposed liability against stockholders of a foreign corporation created in the country in which it was organized will not be enforced in the courts of this country if in violation of the policy of our laws, nor when such enforcement must do violence to the rights of our own citizens. (*Bank of China etc. v. Morse*, 676.)

19. CORPORATIONS, FOREIGN—JURISDICTION OF—SERVICE ON AGENT.—Jurisdiction of a foreign corporation, not hav-

ing a resident agent, is acquired by personal service within the state of a complaint and summons alleging a cause of action arising in such state, upon an agent of such corporation engaged in transacting business for it within the state. (*Abbeville Electric etc. Co. v. Western etc. Co.*, 890.)

20. CORPORATIONS, FOREIGN—SERVICE ON AGENT CASUALLY IN STATE—JURISDICTION.—A state court cannot, in an action in personam, acquire jurisdiction of a foreign corporation simply by personal service of summons upon its officer or agent while he is casually within the state, and not there for the purpose of attending to any business of the corporation. (*Abbeville Electric etc. Co. v. Western etc. Co.*, 890.)

See Abatement; Executions, 6-9; Quo Warranto.

COSTS.

1. COSTS IN CHANCERY CASES are ordinarily in the discretion of the court. (*Carroll v. Tomlinson*, 344.)

2. COST BILL—NEGLECT TO FILE IN TIME.—If the party obtaining judgment neglects for more than the statutory period to file his cost bill, such bill may be stricken out, except as to fees appearing upon the face of the papers in the cause. (*Matheson v. Ward*, 955.)

COTENANCY.

See Adverse Possession, 11; Trover, 2.

CREDITOR'S BILL.

1. CREDITOR'S BILL—PLEADING.—In a bill by judgment creditors of a corporation against it and another, who is alleged to have been an officer of the corporation, and to have sold his stock, directly or indirectly, thereto, knowingly receiving assets thereof in payment therefor, a demurrer for uncertainty, in that the bill does not allege what assets of the corporation were received by such officer or when, is not well taken, as the bill need not allege evidential facts. (*Hall v. Henderson*, 53.)

2. CREDITORS' BILLS.—THE PENDENCY of a creditor's bill filed by one creditor on behalf of himself and others does not preclude another creditor, not a party to the first bill, from proceeding by an original creditor's bill. (*American Pig Iron etc. Co. v. German*, 21.)

3. INTERVENTION—PLEADING.—PETITIONS by intervening creditors in a suit by a creditor's bill are not required to conform to all the technical rules applicable to pleadings as between the original parties, and when filed by leave of court other parties in interest are entitled to notice and an opportunity to defend; but such petitions need not name them as defendants, nor need they contain any formal prayer for process. (*American Pig Iron etc. Co. v. German*, 21.)

CRIME AGAINST NATURE.

See Indictment.

CRIMINAL LAW.

1. CRIMINAL LAW—VIOLATION OF STATUTE—INTENT.—Under statutes expressly prohibiting the commission of an act without reference to the intent or purpose of the person commit-

ting it, it being of the class under which he is under no obligation to act unless he knows that he can do so lawfully, it is no defense that he acted honestly and in good faith, under a mistake of fact. (State v. Ryan, 629.)

2. CRIMINAL LAW—INTENT—VIOLATION OF OLEOMARGARINE STATUTE.—If a person furnishes oleomargarine to a guest in violation of statute, it is no defense that he acted without unlawful intent, and under a mistake of fact. (State v. Ryan, 629.)

3. PURE FOOD LAW.—IN A PROSECUTION FOR SELLING a substance made in imitation of butter, it is not incumbent on the government to show that the defendant had knowledge of the imitation, or had an intention to deceive the purchaser. (State v. Rogers, 395.)

4. CRIMINAL LAW — CAPACITY OF WIFE TO COMMIT CRIME—COERCION OF HUSBAND—PRESUMPTION.—If a wife, at the instigation and request of her husband, procures a revolver and takes it to him in jail, where he is confined, for the purpose of assisting him to escape, and he actively participates with her in conveying the revolver into the jail, it must be presumed that she acts under his direction and coercion, and she is entitled to acquittal of any charge brought against her for the commission of such act unless such presumption is rebutted. (State v. Miller, 498.)

5. VOLUNTARY DRUNKENNESS is never an excuse for crime. (State v. Peterson, 756.)

See Accomplice; Bill of Particulars; Constitutional Law; Indictment.

DAMAGES.

1. DAMAGES.—Evidence of the number and ages of the members of plaintiff's family dependent upon him for support is admissible in an action to recover for personal injuries to him, to prove that such injuries deprive him of capacity to meet obligations imposed upon him by law. (Youngblood v. South Carolina etc. R. Co., 824.)

2. PLEADING—EFFECTS OF PERSONAL INJURY.—In an action to recover for personal injury from negligence, the plaintiff is entitled to show direct specific effects of the injury, without alleging them, as that it produced a particular disease or ailment. (Youngblood v. South Carolina etc. R. R. Co., 824.)

3. EVIDENCE.—IN AN ACTION TO RECOVER FOR PERSONAL INJURY suffered from insecure and defective coupling appliances, plaintiff is entitled to prove that the defendant failed to furnish him with a coupling stick, as was customary under the circumstances. (Youngblood v. South Carolina etc. R. R. Co., 824.)

4. LIQUIDATED DAMAGES OR PENALTY.—The sum fixed by the parties to a contract for its breach is to be treated as liquidated damages, if the damages are uncertain, difficult to ascertain, and speculative, and the contract furnishes no data for their ascertainment. (Taylor v. Times Newspaper Co., 473.)

5. LIQUIDATED DAMAGES.—IF A NEWSPAPER COMPANY agrees to examine a plan to increase its advertising business, and, if it should make use thereof, to pay the originator a certain per centum on the gross receipts for all advertising run within certain periods, the sum stipulated for such use must be

treated as liquidated damages and not as a penalty. (*Taylor v. Times Newspaper Co.*, 473.)

See Death; New Trial.

DEATH.

1. NEGLIGENCE CAUSING PARENTS' DEATH—PECUNIARY BENEFIT TO ADULT CHILDREN—DAMAGES.—Under the statute of Pennsylvania, adult children may recover damages for their parent's death caused by another's negligence, though they are benefited thereby through inheriting a large estate, and its amount, therefore, is not admissible in evidence for the defense. (*Stahler v. Philadelphia etc. Ry. Co.*, 791.)

2. DAMAGES FOR CAUSING DEATH.—WOUNDED FEELINGS AND GRIEF OF BENEFICIARIES producing personal injury may be considered by the jury in estimating damages for a death caused by negligence. (*Stuckey v. Atlantic Coast etc. R. R. Co.*, 842.)

3. DAMAGES FOR PERSONAL SUFFERING.—The suffering of a person whose injury results in death, and of beneficiaries caused by witnessing such suffering, is not an element of damages for negligence in causing the death. (*Stuckey v. Atlantic Coast etc. R. R. Co.*, 842.)

DEEDS AND CONVEYANCES.

1. DEEDS—CONSTRUCTION.—It is the province of the court, and not of the jury, to construe the terms of a deed offered in evidence. (*Sudduth v. Sumeral*, 883.)

2. DEEDS—ACKNOWLEDGMENT OF—COLLATERAL ATTACK UPON.—Although a notary public has such an interest in a conveyance as disqualifies him from taking the separate acknowledgment of the wife of the grantor, and renders the conveyance invalid upon direct attack if so acknowledged, yet its validity or admissibility in evidence because of such defective acknowledgment cannot be collaterally attacked. (*Monroe v. Arthur*, 36.)

3. CONVEYANCES — TRANSACTION, WHETHER MORTGAGE.—If the owners of an equity of redemption execute a quit-claim deed thereof to the mortgagee, who gives back a bond agreeing to convey the premises to them upon payment of a specified sum at a certain date, the transaction does not constitute a mortgage. (*Carroll v. Tomlinson*, 344.)

4. CONVEYANCES.—A BOND FOR A DEED IS NOT FORFEITED by the failure of the obligee to pay the principal at a time specified, if the obligor extends the time of payment first agreed upon. (*Carroll v. Tomlinson*, 344.)

5. CONVEYANCES—BOND FOR DEED—ACCOUNTING FOR RENT.—An obligor in a bond for a deed who has leased the premises under agreement to apply the rent on the bond has no right, without the consent of the obligee, to release the tenant from a part of the rent, and he is chargeable therewith if he could, by reasonable diligence, have collected such rent. (*Carroll v. Tomlinson*, 344.)

See Vendor and Vendee.

DISPENSARY LAW.

See intoxicating Liquor.

DOWER.

See Husband and Wife, 2-4.

DRAINAGE.

See Waters and Watercourses, 3.

EJECTMENT.

EJECTMENT.—PLAINTIFF IN EJECTMENT CANNOT RECOVER ON THE WEAKNESS of title of the defendant. (*Stiff v. Cobb*, 38.)

See Railroads, 1, 2.

ELECTIONS.

1. **ELECTION RETURNS SHOULD NOT BE ACCEPTED AS CONCLUSIVE** if the judges of election have been so careless in the performance of their duties as to cast discredit upon their returns. (*Perkins v. Bertrand*, 315.)

2. **ELECTIONS.—BALLOTS ARE THE BEST EVIDENCE** in determining the result of an election if it appears that they have been preserved in the manner, and by the officers, prescribed by the statute, and have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with. (*Perkins v. Bertrand*, 315.)

3. **ELECTIONS.—WHETHER BALLOTS HAVE BEEN PROPERLY PRESERVED** is a question of fact, to be determined from all the circumstances proved. (*Perkins v. Bertrand*, 315.)

4. **ELECTIONS — BALLOTS — INITIALS OF JUDGE.**—While the statute requiring the official indorsement of the initials of a judge of election is mandatory, yet the indorsement of one initial is a substantial compliance therewith. (*Perkins v. Bertrand*, 315.)

5. **ELECTIONS — BALLOTS — NAME OF JUDGE.**—A ballot properly prepared by a voter and deposited in the ballot-box should be counted, although the judge of election, without the participation of the voter, indorsed his full name thereon instead of his initials. (*Perkins v. Bertrand*, 315.)

6. **ELECTIONS — BALLOTS — DISTINGUISHING MARKS.**—Ballots containing crosses in the circles at the head of the two tickets, also a cross in the square before the name of one of the nominees, are properly counted for the latter. (*Perkins v. Bertrand*, 315.)

7. **ELECTIONS — BALLOTS — DISTINGUISHING MARKS.**—Ballots marked in the circle at the head of the ticket, where the voter has erased the other tickets upon the ballot by drawing lines through them, should not be counted. (*Perkins v. Bertrand*, 315.)

8. **ELECTIONS—BALLOTS—APPELLATE PRACTICE.**—The action of the trial court in counting ballots alleged to contain distinguishing marks cannot be disturbed on appeal, if such ballots are not certified to the appellate court for inspection. (*Perkins v. Bertrand*, 315.)

9. **ELECTIONS.—OFFICIAL BALLOTS** properly marked and initialed, and found in a sealed envelope marked "defective and objected to ballots," may be counted if the reasons given by the judges of election where they were cast for not counting them contain no valid objections. (*Perkins v. Bertrand*, 315.)

10. ELECTIONS — ILLEGAL BALLOTS — RIGHT TO COMPLAIN OF.—Ballots not containing the initials of any judge of election should not be counted, but the right to object to them on appeal is lost if the record does not disclose for whom they were counted, nor that any objection was made to the count thereof. (Perkins v. Bertrand, 315.)

11. ELECTIONS — BALLOTS — DISTINGUISHING MARKS.—Ballots with figures thereon placed there by the judges of election at the time they were cast under a mistaken view of the law, and without the knowledge of the voter, should be counted. (Perkins v. Bertrand, 315.)

See Constitutional Law, 33.

ELECTRICAL COMPANIES.

1. NEGLIGENCE. — THE FAILURE OF AN ELECTRIC LIGHT COMPANY TO KEEP ITS WIRES INSULATED, as required by a municipal ordinance, is prima facie evidence of negligence. (Mitchell v. Raleigh Electric Co., 735.)

2. ELECTRIC LIGHT COMPANIES—PRESUMPTION AS TO INSULATION.—A LINEMAN, who undertakes to convey his wire over the electric wires of another company may presume that they were properly insulated, as required by a municipal ordinance. (Mitchell v. Raleigh Electric Co., 735.)

3. ELECTRIC COMPANIES—PRESUMPTION OF NOTICE.—WHERE AN ABRASION IN AN INSULATED WIRE of an electric light company has been in existence for two years, the court will presume that it was known by the company. (Mitchell v. Raleigh Electric Co., 735.)

EMBEZZLEMENT.

1. EMBEZZLEMENT.—THE ESSENTIAL ELEMENTS of embezzlement are the fiduciary relation arising where one intrusts property to another, and the fraudulent appropriation of the property by the latter. (People v. Gordon, 174.)

2. EMBEZZLEMENT.—A CHARGE OF EMBEZZLEMENT IN THE LANGUAGE OF THE STATUTE is sufficient, at least on a motion in arrest of judgment, though it does not allege the circumstances of the felonious conversion. (People v. Gordon, 174.)

3. EMBEZZLEMENT — UNNECESSARY AVERMENTS.—AN INFORMATION FOR EMBEZZLEMENT, which states that the property was intrusted to the defendant as bailee, sufficiently shows a fiduciary relation, and it is not necessary to aver that the owner or bailor had demanded possession of the property and had been refused. (People v. Gordon, 174.)

4. EMBEZZLEMENT — CONVICTION FOR, IS NOT CONTRARY TO EVIDENCE OR INSTRUCTION, WHEN.—In a prosecution for the embezzlement of a diamond ring by a bailee, where the owner testifies that the defendant took it from her finger "before she knew it," and declared that he would have it fixed for her as an engagement ring; and that he never brought the ring back, but sold it, a conviction is not contrary to the evidence or an instruction that, if the defendant obtained the ring against the will of the prosecuting witness he should be found not guilty. It was the subsequent felonious conversion that constituted the embezzlement. (People v. Gordon, 174.)

5. EMBEZZLEMENT — JURISDICTION — UNOBJECTIONABLE EVIDENCE.—If property is intrusted to, and converted by, one who is tried in the county of such conversion for embezzlement, evidence of what took place in another county, when he received the property, is not objectionable on the ground that it was without the jurisdiction of the court. (People v. Gordon, 174.)

6. EMBEZZLEMENT — INSTRUCTION AS TO LARCENY.—After full instructions, on a prosecution for embezzlement, as to what constitutes that crime, it is not prejudicial error to add an instruction as to what constitutes larceny. (People v. Gordon, 174.)

EMINENT DOMAIN.

1. EMINENT DOMAIN — DAMAGES.—DIMINUTION IN VALUE OF LAND by the construction of a telegraph line through it, although along the public highway in which the owner of the land holds only the fee subject to the public easement, is a proper element of damage in condemnation proceedings. (Board of Trade Tel. Co. v. Darst, 288.)

2. EMINENT DOMAIN—ELEMENTS OF DAMAGE.—If a telegraph line is constructed along a public highway, the abutting owner may show, as elements of damage in condemnation proceedings, the nearness of the poles and structures to his residence, the unsightliness thereof, that it would be more work to cut weeds and grass around the poles, and would render the use of his land inconvenient or dangerous; but the mere possibility that animals might be injured furnishes no ground for the assessment of damages. (Board of Trade Tel. Co. v. Darst, 288.)

3. EMINENT DOMAIN — DAMAGES—SPECULATIVE ELEMENTS.—That the location of a telegraph line rendered it necessary for a land owner to build a board fence for the protection of his stock may be proved as an element of damages in condemnation proceedings, but the cost of the renewal of such fence every ten years for a hundred years is too speculative to be considered. (Board of Trade Tel. Co. v. Darst, 288.)

See Railroads, 1, 2.

ESCHEAT.

1. ESCHEAT OF REAL PROPERTY, WHEN NOT PROVIDED FOR BY A CONSTITUTION.—A mandatory provision of a constitution against holding real estate for a longer period than five years, except such as may be necessary for carrying on the business of a corporation, which fails to declare what results shall follow a violation of the provision, does not accomplish an escheat of property held by a corporation for more than five years without a sale. (People v. Stockton etc. Soc., 225.)

2. ESCHEAT — LAND HELD BY A CORPORATION FOR MORE THAN FIVE YEARS.—Under a constitution which provides that no corporation shall hold any real estate for a longer period than five years, except such as may be necessary for carrying on its business, and a statute which provides that lands purchased by a corporation under pledges, mortgages, or deeds of trust made for its benefit, must be sold within five years after title has vested, no action can be maintained to escheat to the state lands held by a savings and loan association, on the ground that it has held them for more than five years without sale. (People v. Stockton Sav. etc. Soc., 225.)

ESTATE OF DECEDENT.

See Executors and Administrators; Husband and Wife.

ESTOPPEL.

1. ESTOPPEL IN PAIS MUST BE PLEADED and the facts supporting it clearly made out by the person relying upon it. It can never arise from ambiguous facts, and must be established by such as are unequivocal and not susceptible of two constructions. It cannot rest in mere inference or argument, but must be a precise affirmation of that which makes it. (Hall v. Henderson, 53.)

2. ESTOPPEL AGAINST STATE.—The doctrine of equitable estoppel has no application to a state. Therefore, it cannot be estopped on the ground that its agent acted under apparent authority. (Carolina Nat. Bank v. State, 865.)

3. ESTOPPEL.—THE UNAUTHORIZED ACT OF A STATE OFFICER in accepting, indorsing, and negotiating a note, and placing the proceeds to the credit of the state, does not estop the latter from showing that his act was unauthorized. (Carolina Nat. Bank v. State, 865.)

See Railroads, 1, 2.

EVIDENCE.

1. EVIDENCE.—ERROR IN ADMITTING EVIDENCE IS CURED by explicit instructions to the jury to disregard such evidence. (Stuckey v. Atlantic Coast etc. R. R. Co., 842.)

2. EVIDENCE.—THE ERRONEOUS ADMISSION in evidence of a newspaper article relating solely to a matter not in dispute is harmless, and not ground for relief. (State v. Saidell, 627.)

3. THE PRACTICE OF ADMITTING EVIDENCE OUT OF ITS ORDER, and ruling upon evidence upon the assumption that other evidence has been introduced, or that it would be afterward, should not be allowed. (Fuller v. Knights of Pythias, 744.)

4. PRIVILEGED COMMUNICATIONS.—AS BETWEEN ATTORNEY AND CLIENT, the attorney's mouth is sealed for all time except by consent of his client. (Fuller v. Knights of Pythias, 744.)

5. PRIVILEGED COMMUNICATIONS — PHYSICIAN AND PATIENT.—UNDER THE NORTH CAROLINA STATUTES, a judge, in furtherance of the administration of justice, may compel a physician to disclose the information acquired by him from his patient. (Fuller v. Knights of Pythias, 744.)

6. PRIVILEGED COMMUNICATIONS — PHYSICIAN AND PATIENT.—A WAIVER, in an application for life insurance, of the right of the insured to object to the evidence of a physician acquired while attending him, is good and binding upon the beneficiary. (Fuller v. Knights of Pythias, 744.)

7. STATE COURTS DO NOT TAKE JUDICIAL NOTICE OF the common law as applied in various states. (Crandall v. Great Northern Ry. Co., 458.)

8. THE COMMON LAW OF A SISTER STATE is presumed to be the same as in the state of the forum. (Crandall v. Great Northern Ry. Co., 458.)

9. **CONTRACTS—EVIDENCE TO VARY.**—In the absence of fraud or mistake, parol evidence is not admissible to contradict or vary a written agreement. (*Orim v. Crim*, 521.)

10. **FOREIGN LAW—WHEN A QUESTION OF LAW, AND WHEN OF FACT.**—Although what is a foreign law is usually denominated a question of fact, yet when it merely involves the construction of a written statute or the interpretation of a judicial opinion, it becomes a question of law. (*Bank of China etc. v. Morse*, 676.)

11. **EVIDENCE.—AN ABSTRACT OF TITLE** is admissible not to show title, but as evidence of good faith on part of purchaser of property. (*Lennartz v. Quilty*, 260.)

See *Bastardy Proceedings; Homicide; Referees; Witnesses.*

EXECUTIONS.

1. **EXECUTIONS—JUDGMENT OF JUSTICE'S COURT—PREMATURE RETURN.**—Under a statute prohibiting the issuance of an execution out of the circuit court on a transcript judgment of a justice's court, until an execution has been issued by the justice and returned nulla bona, at the expiration of ninety days, an execution returnable in eighty-eight days is premature, and will not support a sheriff's sale and deed under an execution out of the circuit court. (*Reed v. Lowe*, 578.)

2. **EXECUTIONS—PREMATURE RETURN—EFFECT.**—When the time is fixed by law for the return of an execution, its return at a prior date is not only premature and irregular, but is insufficient to support further proceedings resting thereon. (*Reed v. Lowe*, 578.)

3. **EXECUTIONS—RETURN—WHAT SHOULD STATE.**—An execution returned "not served for want of property" is insufficient under a statute requiring the return to state "that the defendant had no goods or chattels whereof to levy the same." (*Reed v. Lowe*, 578.)

4. **EXECUTION SALE—JUSTICE'S JUDGMENT—BURDEN OF PROOF.**—In an execution sale on a transcript judgment from a justice's court, where the judgment debtor is a resident of the county, the burden is on the party claiming under the sheriff's deed to show that an execution had been issued by the justice and returned nulla bona, at the expiration of ninety days before an execution could be issued by the clerk of the circuit court. (*Reed v. Lowe*, 578.)

5. **EXECUTION—RECITALS IN—RETURN—JUSTICE'S JUDGMENT.**—A recital in an execution issued by the circuit clerk on a transcript judgment of a justice of the peace, that an execution had been issued by the justice, and returned that the defendant had no goods or chattels whereof to levy the same, is not evidence of these facts. (*Reed v. Lowe*, 578.)

6. **EXECUTION SALE OF CORPORATE STOCK.—A PURCHASER,** at an execution sale, of the shares of a corporation, standing on its books in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him as such purchaser, if, at the time of the purchase, he acts in good faith and without notice that the outstanding certificate has been assigned or pledged. (*West Coast etc. Co. v. Wulff*, 171.)

7. A PLEDGEE OR ASSIGNEE OF CORPORATE STOCK CAN PROTECT HIMSELF AGAINST a purchaser at an execution sale only by causing a reissue of the certificate, or by serving notice on the corporation that he holds the certificate as such assignee or pledgee. (West Coast etc. Co. v. Wulff, 171.)

8. CORPORATE STOCK.—IT IS NOT ESSENTIAL TO THE VALIDITY of an execution sale of shares of stock in a corporation that the sheriff have manual possession of the certificate at the time of the sale, or that he should deliver it to the purchaser. (West Coast etc. Co. v. Wulff, 171.)

9. EXECUTION SALE OF CORPORATE STOCK—REMEDY OF PURCHASER.—After an execution sale of corporate stock pledged as collateral security, of which fact the purchaser had no notice, the pledgee may be compelled to surrender it so that it may be reissued to the purchaser, and this procedure applies to an execution issued out of a justice's court. (West Coast etc. Co. v. Wulff, 171.)

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS TAKE AND ADMINISTER upon the estate owned by the deceased as it existed at the time of his death. (People v. Petrie, 268.)

2. EXECUTOR'S BOND—LIABILITY OF SURETIES.—AN EXECUTOR, WHO IS ALSO TRUSTEE of a fund by the will, does not, in his dealings with the trust fund, create any liability against sureties upon his bond as executor. (People v. Petrie, 268.)

3. EXECUTOR AND TRUSTEE—BONDS OF.—A court of chancery has power and jurisdiction to require a trustee, who is also executor under the will appointing him trustee, to execute a bond, with sufficient sureties, conditioned for the faithful performance of the trust and the preservation of the fund. (People v. Petrie, 268.)

3a. ADMINISTRATOR'S BOND.—THE STATUTE OF LIMITATIONS begins to run against an action by a distributee on an administrator's bond from the time of the final decree of distribution. (Ganser v. Ganser, 461.)

3b. ADMINISTRATOR'S BOND.—LEAVE TO SUE is essential to the right to commence an action on an administrator's bond, but it is no part of the cause of action. (Ganser v. Ganser, 461.)

4. JUDGMENTS AGAINST EXECUTORS ARE NOT BINDING ON THE HEIRS. Therefore, in an action against them to enforce against lands devised the payment of a judgment against an executor founded on a note they may assert any defense to which the note was subject. (Brock v. Kirkpatrick, 847.)

5. PRACTICE — ACTION ON JUDGMENT.—LEAVE OF COURT is not necessary to enable the creditor of a decedent to institute an action against the devisee on a judgment obtained against the executors to subject the land devised to the payment of his debt. (Brock v. Kirkpatrick, 847.)

6. EXECUTORS AND ADMINISTRATORS — JUDGMENTS AGAINST RIGHT TO ENFORCE AGAINST DEVISEE.—The right of the creditor of a decedent to have his judgment against the executors paid out of land devised to a third person cannot be affected by any derangement it may cause of the testator's plan for the division of the estate. (Brock v. Kirkpatrick, 847.)

7. LIMITATIONS OF ACTIONS—CHARGING DEVISEES.—The statute of limitations does not run so as to protect a devisee in possession against his liability to pay the testator's debts until after the remedy has been exhausted against the executor. (*Brock v. Kirkpatrick*, 847.)

8. ADMINISTRATOR'S SALE UNDER ORDER OF COURT—CONFIRMATION—EFFECT OF.—Upon a sale by an administrator the liability of the purchaser is fixed by the return and confirmation. He cannot thereafter claim either a failure of title, misrepresentations by the administrator, or other matter attacking the validity of the sale. (*Fahrig v. Schimpff*, 796.)

9. ADMINISTRATOR'S SALE, PURCHASER CANNOT QUESTION AFTER CONFIRMATION.—If a sale by an administratrix has been confirmed, the purchaser cannot, in an action by her to recover the amount of his bid, set up as a defense that he purchased at her personal solicitation, and was only to be accountable to her for what he realized upon a resale of the property. (*Fahrig v. Schimpff*, 796.)

10. ESTATES OF DECEDENTS—LIMITATIONS ON CLAIMS NOT DUE WHEN PRESENTED.—If a statute provides that the holder of a rejected claim must sue thereon "within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred," he may sue on his claim within two months after maturity, though more than three months have elapsed since its rejection. (*Moore v. Russell*, 166.)

11. ESTATES OF DECEDENTS—PRESENTATION OF MORTGAGE AGAINST.—Under a statute providing that, in presenting a mortgage to an administrator for allowance, it shall be sufficient to describe it by reference to the date, volume, and page of its record, a presentation making such reference, and stating that the mortgage is on realty in a certain county, and was given to secure a note, a copy of which is contained in the presentation, is good, even if anything more is required than a reference to the recordation. (*Moore v. Russell*, 166.)

12. ESTATE OF DECEDENT.—THE RIGHT OF A DISTRIBUTEE to his share of the estate of a decedent accrues at the time of the final decree of the probate court. (*Ganser v. Ganser*, 461.)

See *Benefit Societies*, 6; *Husband and Wife*, 5-8; *Mortgages*, 2.

EXEMPTIONS.

See *Attachment*.

EXPERT EVIDENCE.

See *Witnesses*, 5-7.

FIRE-ESCAPES.

FIRE-ESCAPES.—DUTY TO PROVIDE buildings with fire-escapes required by statute rests primarily upon owners of buildings, and the liability resulting from its nonperformance does not depend upon the serving of notice to erect such fire-escapes. (*Arms v. Ayer*, 357.)

See *Constitutional Law*, 11.

FOREIGN LAW.

See *Evidence*, 9, 10; *Pleading*, 1, 2.

FORGERY.

1. **FORGERY.—ALTERING, BY RAISING THE AMOUNT of a promissory note, is forgery.** (Merritt v. Boyden, 246.)

2. **IN AN INDICTMENT FOR FORGERY, it is not necessary to allege loss of the instrument, and in the absence of the instrument, only its substance need be charged.** (State v. Peterson, 756.)

3. **FORGERY—EVIDENCE.—WHERE A FORGED INSTRUMENT IS SHOWN TO BE LOST, a witness may give its substance from memory.** (State v. Peterson, 756.)

4. **FORGERY—SUFFICIENT EVIDENCE.—If it appears that the accused was in possession of the forged instrument, attempting to utter, pass, or deliver it, this is sufficient evidence to go to the jury.** (State v. Peterson, 756.)

5. **FORGERY.—THE ABSENCE OF A REVENUE STAMP from a note has no bearing upon the question whether the defendant forged it.** (State v. Peterson, 756.)

6. **FORGERY—PRESUMPTION.—Where one is found in the possession of a forged instrument, endeavoring to obtain money or advances upon it, this raises a presumption that he either forged it or consented to its forgery.** (State v. Peterson, 756.)

FOUND PROPERTY.

1. **PERSONAL PROPERTY — POCKET OF QUARTZ GOLD WITHOUT OWNER—FINDER'S RIGHT TO.—If a laborer, employed to dig and level off a grade on public land for a quartz-mill, but which is not within any mineral location, finds a pocket of quartz gold while so working at or close to the upper edge of the sloping rock left by the excavation, such gold, when extracted by him, belongs to him as first taker, under the laws of the United States, and he may recover it from his employers who have wrongfully seized and converted the same to their own use.** (Burns v. Clark, 233.)

2. **MASTER AND SERVANT—POCKET OF QUARTZ GOLD FOUND IS NOT ACQUIRED "BY VIRTUE OF EMPLOYMENT," WHEN.—When a laborer, employed to dig and level off a grade on public land for a quartz-mill, but which is not within any mineral location, finds a pocket of quartz gold, while so working, and extracts it, such gold is not acquired "by virtue of his employment," because the employers were engaged in excavating, not to extract minerals, but for the purpose of establishing a millsite.** (Burns v. Clark, 233.)

FRAUD.

1. **ONE MAKING A MISREPRESENTATION IS RESPONSIBLE to such persons only as it is intended for.** (Henry v. Dennis, 365.)

2. **MISREPRESENTATION TO THIRD PERSON.—A misrepresentation to one with the intention that it shall reach and be acted upon by another, and which does reach and is acted upon by him, gives him the same right to relief or redress as if made to him directly.** (Henry v. Dennis, 365.)

3. **MISREPRESENTATION.—ONE IS LIABLE TO A PARTNERSHIP for misrepresentation to one of its members, though not made to him as such, if he, relying thereon, induces his firm to act to its injury.** (Henry v. Dennis, 365.)

FRAUDULENT CONVEYANCE.

See Attachment, 1.

GIFTS.

A GIFT OF A BANK DEPOSIT may be effected, though there is no change of credit on the books of the bank, by substantial acts of the donor tending to carry the gift into effect, and give the donee dominion over such deposit. (*Murphy v. Bordwell*, 454.)

HABEAS CORPUS.

1. HABEAS CORPUS—DELAY IN BRINGING TO TRIAL.—Under the constitutional guaranty of a speedy trial, and a statutory provision that a defendant shall be discharged unless he has been brought to trial within sixty days after the filing of the indictment or information, if the trial has not been postponed upon his application, he is entitled to his discharge on habeas corpus whenever the sixty days elapse without a trial, there being no good reason for delay, and the defendant not consenting thereto. (*In re Begerow*, 178.)

2. HABEAS CORPUS—DELAY AFTER MISTRIAL.—While a mistrial is not a trial, and may excuse delay in bringing a defendant to trial, yet, under a statute requiring him to be brought to trial within sixty days after the filing of the information, if he has had several mistrials, for failure of the jury to agree, and a delay of eighty-four days is allowed to elapse, after the last mistrial, without putting his case upon the calendar, he is entitled to his discharge on habeas corpus, where no excuse is given for the delay, and it was not caused by the defendant or with his consent. (*In re Begerow*, 178.)

HIGHWAYS.

1. HIGHWAYS—USE OF.—No person has an absolute right to use for any purpose land acquired for a highway. The state can regulate the public right of travel thereon, so long as such regulation applies alike to all persons, and is reasonable. (*State v. Aldrich*, 631.)

2. HIGHWAYS—USE OF—CONSTITUTIONAL LAW.—If, under a statute, any person may make the same use of a highway as every other person of the same age, sex, and condition, employing the same mode of travel, it is an equal and constitutional law. (*State v. Aldrich*, 631.)

3. HIGHWAYS—CONSTITUTIONAL LAW—USE OF BICYCLES.—A statute prohibiting the riding of bicycles on sidewalks by persons over twelve years of age is reasonable and valid, and deprives no one of the equal protection of the law, guaranteed by the national and state constitutions. (*State v. Aldrich*, 631.)

See Boundaries.

HOMESTEADS.

HOMESTEAD—GOVERNMENT LAND—CONVEYANCE—ACKNOWLEDGMENT OF WIFE.—If a married man procures a homestead certificate to government land, and he and his family live upon the land, cultivating it, and claiming it as his homestead, it is a homestead from the time of entry and before patent issues, and a deed conveying a strip of such land to a railroad as a right

of way is void, where the wife makes no acknowledgment separate and apart from her husband, as required by the law of the state where the land is situated. (*Griffin v. Chattanooga etc. R. R. Co.*, 143.)

See Adverse Possession; Constitutional Law, 14.

HOMICIDE

MURDER.—EVIDENCE OF THE DEFENDANT'S GOOD CHARACTER, on a trial for murder, is substantive and positive proof in his behalf, and may give rise to a reasonable doubt, which would not otherwise exist, by making it improbable that a man of such character would commit the offense charged; but if the jury is satisfied, beyond a reasonable doubt, under all the evidence, that the defendant is guilty, evidence of previous good character is not sufficient to overcome the conclusion which follows from that view of the case. (*Commonwealth v. Harmon*, 799.)

HUSBAND AND WIFE

1. HUSBAND AND WIFE—DEED OF SEPARATION WITHOUT WIFE'S ACKNOWLEDGMENT.—A deed of separation between husband and wife is binding on both parties thereto, and bars her right of dower in his real estate, without any separate acknowledgment by her, where the separation is actual and immediate, based upon a good consideration and upon terms advantageous to her, and is carried into effect by the parties. (*Kaiser's Estate*, 785.)

2. A WIFE CANNOT BAR HER DOWER or her right and interest by descent by simply contracting mutual releases with her husband. (*Pinkham v. Pinkham*, 392.)

3. STATUTES EXTENDING THE POWER OF WIVES TO contract with their husbands are construed strictly as in derogation of the common law, and as modifying a long approved policy. (*Pinkham v. Pinkham*, 392.)

4. IF JOINTURE OR PECUNIARY PROVISION IS MADE FOR A WIFE, even with her consent, and her dower or right and interest by descent will be thereby barred, she may waive the provision, and save her interest. (*Pinkham v. Pinkham*, 392.)

5. MARRIED WOMEN'S ESTATES—HUSBANDS' RIGHTS IN.—At common law marriage operated as an absolute gift to the husband of the personal property of which the wife was possessed, and of her choses in action reduced to possession during coverture. (*Locke v. McPherson*, 546.)

6. MARRIED WOMEN—ESTATES OF DECEDENTS—CHOSES IN ACTION.—A HUSBAND was entitled, at common law, to administer on the choses in action of his deceased wife not reduced to possession during her life, and in this way reduce them to possession for his own use. (*Locke v. McPherson*, 546.)

7. MARRIED WOMEN—DISTRIBUTION OF THEIR PERSONAL PROPERTY.—Under the statutes of Missouri, when a married woman dies intestate leaving personal property that she had held in her lifetime as her statutory separate estate, it passes to her administrator, and is distributed on final settlement according to the same statutes that direct the course of distribution of any other intestate's estate. (*Locke v. McPherson*, 546.)

8. MARRIED WOMEN—CONFLICT OF LAWS—DISTRIBUTION OF PERSONALTY.—A statute providing that the personal

property of a nonresident shall be distributed according to the laws of the decedent's domicile has no application where there is no foreign law to govern the case; hence it cannot apply to the estate of a deceased woman who had married a nonresident in the state where her property is situated, where under the law of the foreign state there is no estate to distribute, and no statute of distribution by which the husband can take the estate. (*Locke v. McPherson*, 546.)

See Adverse Possession; Criminal Law, 4; Witnesses, 1, 2.

INDIOTMENT.

CRIMINAL LAW—CRIME AGAINST NATURE.—An indictment charging a crime against nature in the language of the statute, or so plainly that its nature may be easily understood by the jury, is sufficient, and it need not set forth the manner of committing the offense. (*Kelly v. People*, 323.)

INHERITANCE TAX.

See Constitutional Law, 13.

INJUNCTION.

1. INJUNCTION — ENTICING APPRENTICES TO JOIN A LABOR UNION.—One has a right to employ persons who do not belong to a labor union, and to adopt a system of apprenticeship which excludes his apprentices from membership in such a union. Hence, if any person with knowledge that the employer has contracted with his apprentices not to join a labor union, interferes with his business, by enticing his apprentices to violate their covenant with him by joining a labor union, the act is unlawful and may be restrained by injunction, where it threatens irreparable injury. (*Flaccus v. Smith*, 779.)

2. INJUNCTION — TRESPASS.—An injunction will not be granted to restrain a trespasser merely because he is such. (*Deegan v. Neville*, 137.)

3. INJUNCTION—TRESPASS.—The foundation of the jurisdiction to enjoin trespassers rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits. (*Deegan v. Neville*, 137.)

4. INJUNCTION.—WHETHER AN INJURY IS IRREPARABLE so as to authorize the granting of an injunction must be determined by the particular facts shown in each case. To be irreparable, injury must be of a peculiar nature, so that compensation in money cannot atone for it, or where it can thus be atoned for, it must appear that the defendant is insolvent, and on that account unable to atone for it. (*Deegan v. Neville*, 137.)

5. INJUNCTION—TRESPASS—DESTRUCTION OF FULL ENJOYMENT.—Where trespasses are not destructive of the use for which premises are rented, and the tenant's business is not interfered with, the tenant shows no ground for an injunction by reason of the destruction of the right of his full enjoyment of the premises. (*Deegan v. Neville*, 137.)

6. INJUNCTION—REPEATED TRESPASSES.—The mere fact that acts of trespass are often repeated does not in itself authorize the issuance of an injunction to restrain their commission. (*Deegan v. Neville*, 137.)

7. INJUNCTION—TRESPASS—MULTIPLICITY OF SUITS.—The doctrine that equity will enjoin trespasses to prevent a multiplicity of suits has no application to persons who are guilty of a repetition of the same trespasses, simply because there may be several of them asserting to do so under the authority of, and by the direction of, one of them who alone claims the right to the possession of the lands. (*Deegan v. Neville*, 137.)

8. INJUNCTION—TRESPASS OF LANDLORD—COVENANT FOR QUIET ENJOYMENT.—A tenant is not entitled to an injunction against his landlord to restrain him from committing trespass upon the leased property, since he may have a full and adequate remedy in an action at law upon his implied covenant of quiet enjoyment. (*Deegan v. Neville*, 137.)

INSOLVENCY.

1. INSOLVENCY.—NONRESIDENT CREDITORS of an insolvent corporation participating in the distribution of a fund set apart for them may prove their claims for unpaid balances in an insolvency proceeding against the same corporation in another state. (*Bank Commrs. v. Granite State etc. Assn.*, 646.)

2. INSOLVENCY.—NONRESIDENT CREDITORS of an insolvent corporation, participating in the distribution of a fund held for their benefit by an ancillary assignee in insolvency in another state, are entitled to share in a general distribution of the assets of the corporation in the state of the primary insolvency administration, to the extent of equalizing the whole amount paid them with the whole amount paid to domestic creditors. (*Bank Commrs. v. Granite State etc. Assn.*, 646.)

INSTRUCTIONS.

1. JURY TRIAL.—INSTRUCTIONS UPON SPECIFIC PROPOSITIONS are waived unless specially requested. (*Youngblood v. South Carolina etc. R. R. Co.*, 824.)

2. TRIAL.—INSTRUCTIONS.—It is not error to refuse to give requested instructions if they have already been given in substance. (*Howay v. Going-Northrup Co.*, 942.)

3. INSTRUCTIONS.—IT IS NOT AN EXPRESSION OF AN OPINION upon the issues of fact for the presiding justice to state in his charge to the jury that there is no evidence impeaching the character of a witness for virtue or integrity. (*State v. Means*, 421.)

4. A COURT MAY INSTRUCT THE JURY TO APPLY TO TESTIMONY the tests of consistency and probability, and aid them in arriving at the fact in issue by stating both affirmatively and interrogatively the questions to be considered and determined by them. (*State v. Means*, 421.)

5. WHERE INSTRUCTIONS BEAR UPON THE ISSUE, the court disclaims any purpose of assuming to determine the facts by stating to the jury in the same connection: "That is for you to judge." "These are considerations for you; I express no opinion." (*State v. Means*, 421.)

6. INSTRUCTIONS.—COMMENTS OF THE COURT which are deductions of truth based upon general experience are not subject to exception. (*State v. Means*, 421.)

7. INSTRUCTIONS—OPINION OF COURT.—An instruction stating a rule of conduct so uniform among men as to be proverbial is not an expression of the opinion of the court. (*State v. Means*, 421.)

8. INSTRUCTIONS.—THE COURT, IN ADDITION TO INSTRUCTING the jury upon the law, should aid them by recalling and collating the details of testimony and resolving complicated evidence into its simplest elements. (*State v. Means*, 421.)

See Evidence, 1.

INSURANCE.

1. FIRE INSURANCE—UNOCCUPIED BUILDING.—THERE CAN BE NO RECOVERY upon a policy of fire insurance, which provides that it shall be void if the building, "whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days," though it appears that, at the time the insurance was placed, the building, a new dwelling-house built to be sold, and never before tenanted, was, to the knowledge of the defendant's agents, and therefore to its knowledge, unoccupied; that no question of its occupancy, present or future, was raised between the parties as affecting the contract; and that the plaintiff took the policy, as prepared by the defendant's agents, without reading it and believing it to accord with his agreement with them; but where it further appears that the building remained unoccupied for more than ten days thereafter, and that, after being occupied for some months, it became again vacant and so remained for more than ten days until destroyed by fire. (*Moore v. Niagara Fire Ins. Co.*, 771.)

2. INSURANCE.—IF ARBITRATION OF THE AMOUNT OF LOSS is made a condition precedent to a right of action on a fire insurance policy, and the award made is repudiated by the insured as invalid, but without fault of the insurer, the insured cannot, without showing a new reference or an excuse therefor, maintain an action to recover damages irrespective of the amount of the award. (*Fisher v. Merchants' Ins. Co.*, 428.)

INSURANCE COMPANY.

See Receivers, 2, 3.

INTERNAL REVENUE STAMPS.

See Forgery, 5.

INTERSTATE COMMERCE.

See Constitutional Law, 16-19; Intoxicating Liquors, 7.

INTERVENTION.

See Creditors' Bills, 3.

INTOXICATING LIQUORS.

1. LIQUOR SELLER'S LIABILITY FOR ASSAULT.—A person managing a public place of amusement who sells liquor to one in attendance, rendering him drunk and disorderly, is liable for an assault by him upon another patron. (*Mastad v. Swedish Brethren*, 446.)

2. DISPENSARY LAW—CONSTITUTIONALITY—REVENUE ACT.—An act to provide for the dispensing of liquors by municipalities under limitations, the municipalities to pay the regular license tax, is a police regulation, and not an act for raising revenue, and hence need not originate in the House of Representatives. (Sheppard v. Dowling, 68.)

3. DISPENSARY LAW — GOVERNMENT ENGAGING IN PRIVATE BUSINESS—POLICE POWER.—Under its police power, the state may regulate the liquor traffic by placing it in the hands of disinterested men, and authorizing municipalities to engage in its sale is a mere necessary incident to the exercise of this power, and is not the government engaging in private business within the prohibition of the constitution. (Sheppard v. Dowling, 68.)

4. DISPENSARY ACT—CONSTITUTIONAL LAW—MUNICIPALITIES.—Under the constitution of Alabama the legislature may authorize towns and counties to carry on the liquor traffic as an incident to the regulation of that traffic. (Sheppard v. Dowling, 68.)

5. DISPENSARY LAW—CONSTITUTIONALITY — PURSUIT OF HAPPINESS.—To prohibit the sale of intoxicating liquors by all individuals, and committing the traffic exclusively to towns and counties, does not violate the inalienable right of the citizen to the pursuit of happiness, and is not class legislation. (Sheppard v. Dowling, 68.)

6. DISPENSARY LAW—REPEAL OF OTHER LAWS.—The provision of a dispensary act that it does not repeal any law that tends to prohibit, retard, restrain or restrict the traffic in intoxicating drinks, does not refer to general or special laws regulating the method of obtaining licenses to sell liquor, and such laws are repealed. (Sheppard v. Dowling, 68.)

7. DISPENSARY ACT—CONSTITUTIONAL LAW—REGULATING INTERSTATE COMMERCE.—An act prohibiting the sale of liquors in certain counties by all persons except dispensers, but providing that manufacturers may sell to anyone who is authorized to deal in liquors, is not unconstitutional as being an attempt to regulate interstate commerce, since the act has no reference to sales made outside of such designated counties. (Sheppard v. Dowling, 68.)

INTOXICATION.

See Criminal Law, 5.

JOINTURE.

See Husband and Wife, 4.

JOURNALS.

See Legislative Journals.

JUDGE.

See Venue.

JUDGMENTS.

1. JUDGMENTS—CONFESSION OF.—A joint warrant of attorney to confess judgment does not authorize a several judgment against the surviving maker of a joint and several note. (Mayer v. Pick, 852.)

2. JUDGMENTS.—POWER TO CONFESS A JUDGMENT must be clearly given and strictly pursued, or the judgment is void. (*Mayer v. Pick*, 352.)

3. JUDGMENT—CONFESSION OF—VALIDITY.—A confession of judgment under a joint warrant of attorney against the surviving maker of a joint and several note, taken before the note is due, is void, and must be vacated on motion. (*Mayer v. Pick*, 352.)

4. JUDGMENT BY CONFESSION—COLLATERAL ATTACK. The record of the entry of a judgment by a prothonotary, under a power contained in the instrument on which judgment is confessed, is a record of the court, having all the qualities of a judgment on a verdict, and therefore not subject to collateral attack. (*Kostenbader v. Kuebler*, 783.)

5. JUDGMENT BY CONFESSION—COLLATERAL ATTACK. IF THE ENTRY, by a prothonotary, of a confessed judgment, purports to have been made on a certain day, the record is conclusive when it is sought, in a collateral proceeding, such as an action of ejectment, to impeach the entry by showing that it was made on the next day. (*Kostenbader v. Kuebler*, 783.)

6. JUDGMENTS — SUITS ON—DEFENSES.—After judgment on a note the latter is merged in the former, and defenses that might have been available if properly interposed in the suit on the note cannot be set up against the judgment. (*Crim v. Crim*, 521.)

7. JUDGMENTS—DEFENSES.—FRAUD IN A NOTE constituting the cause of action is not a defense in an action on the judgment into which it has been merged. (*Crim v. Crim*, 521.)

8. FOREIGN JUDGMENTS BY CONFESSION.—A judgment without process or actual appearance on a note containing a cognovit authorizing any attorney to appear in any court in the United States, waive process, enter appearance, and confess judgment for the amount due, with interest and costs, and release all errors, if authorized by the laws of the state where the judgment is rendered and the note is made, must be given "full faith and credit" when sued upon in another state. (*Crim v. Crim*, 521.)

9. JUDGMENTS—FOREIGN—LIMITATIONS.—If judgment is obtained in one state, and before it has expired by limitation suit is brought thereon in another, the fact that the cause of action upon which the judgment was obtained has expired by limitation in the latter state is immaterial, and does not bar the action. (*Crim v. Crim*, 521.)

10. JUDGMENTS—ACTIONS ON.—BY THE LAWS OF KANSAS, a personal judgment against two parties is a joint and several obligation, and an action upon it can be maintained against either of the judgment debtors separately. (*Berkley v. Tootle*, 587.)

11. JUDGMENTS—ACTIONS ON—STATUTE OF LIMITATIONS.—Prior to revision of the Missouri laws of 1899, an action upon a judgment of a court of record of a sister state was not barred until after the lapse of twenty years from its date. (*Berkley v. Tootle*, 587.)

12. JUDGMENTS—ACTIONS ON—WHEN BECOME DORMANT.—IN KANSAS, when a judgment becomes dormant by a failure to issue execution thereon for five years, and has not been revived, and no suit has been brought thereon within one year after the expiration of the five years, no suit can thereafter be maintained upon it. (*Berkley v. Tootle*, 587.)

13. FOREIGN JUDGMENTS—ACTIONS ON—STATUTE OF LIMITATIONS—LEX FORI.—Where all remedy on a judgment has not been destroyed by the statute of limitations of the state where it is rendered, and the judgment is not dead, an action may be maintained thereon in the courts of another state, and the statute of limitations of the latter state applies. (*Berkley v. Tootle*, 587.)

14. JUDGMENTS—ACTIONS ON.—If the assignor and assignee of a judgment join in a creditor's bill thereon, it is not necessary that it allege a formal transfer of the judgment, nor is proof thereof necessary. (*Hall v. Henderson*, 53.)

15. JUDGMENTS NOT VOID ON THEIR FACE are not open to collateral attack. (*Hall v. Henderson*, 53.)

16. JUDGMENT — COLLATERAL ATTACK — SERVICE OF SUMMONS.—A judgment regular on its face cannot be collaterally attacked for an irregular service of summons. (*Bennett v. Wilson*, 207.)

17. JUDGMENT—COLLATERAL ATTACK BY ONE WHOSE RIGHTS WERE NOT AFFECTED.—A judgment regular on its face cannot be collaterally impeached by one whose rights could not have been affected thereby at the time of its rendition. (*Bennett v. Wilson*, 207.)

18. JUDGMENT — COLLATERAL ATTACK, BY REDEMPTIONER, FOR IRREGULAR SERVICE OF SUMMONS.—When property is sold under execution, its redemptioner cannot, where no fraudulent collusion is shown, collaterally impeach a subsequent redemptioner's judgment, of a later date and regular upon its face, by showing that it was rendered upon an irregular service of summons, where the rights of the prior redemptioner, existing at the time of the subsequent redemptioner's judgment, were not affected thereby. (*Bennett v. Wilson*, 207.)

19. JUDGMENTS—PROPERTY IN ANOTHER STATE.—A judgment in a state court, in which ancillary administration in insolvency is had, is conclusive in another state where the primary administration is had, so far only as it relates to the property in the former state, although the primary assignee in insolvency was a party to the proceedings in such other state. (*Bank Commrs. v. Granite State etc. Assn.*, 646.)

20. RES JUDICATA.—A JUDGMENT DISMISSING AN ACTION, without prejudice to the plaintiff, is not a bar to a subsequent action. (*Moore v. Russell*, 166.)

See Executors and Administrators, 4-6; Receivers, 7.

JUDICIAL NOTICE

See Evidence, 7.

JURISDICTION.

JURISDICTION OF NONRESIDENTS.—The courts of England cannot acquire jurisdiction over a defendant by the service of process on him within the United States, which will enable them to award personal judgment against him. (*Bank of China etc. v. Morse*, 676.)

See Venue.

JUSTICE'S COURT.

See Executions, 1-5.

LABOR UNIONS.

See Injunctions.

LANDLORD AND TENANT.**LANDLORD AND TENANT—CONDITION OF PREMISES.**

If a vault under a sidewalk and coal-hole connecting therewith are constructed by the owner of the premises under license from the city, and are in good condition when he delivers possession to the tenant in exclusive possession of that portion of the building with which such vault and coal-hole are connected and used, the tenant under his covenant to make repairs, and not the landlord, is liable for injuries caused by failure to keep the covering of the coal-hole in repair. (West Chicago Masonic Assn. v. Cohn, 327.)

See Injunctions, 8.

LAW.

RULES OF LAW, WHEN CHANGED.—When the nature of things changes, the rules of law must change too. (Shayne v. Evening Post Pub. Co., 654.)

LEGISLATIVE JOURNALS.

1. LEGISLATURE—JOURNALS OF HOUSE—WHAT ARE.—The bound volume kept for a journal of legislative proceedings and filed in the office of the Secretary of State, and not the file of memorandum sheets from which such book is made, constitutes the true "journal" of the house of the legislature to which it relates, and must contain the required entry of proceedings in the enactment of statutes. (Montgomery Beer Bottling Works v. Gaston, 42.)

2. LEGISLATIVE JOURNALS—UNLAWFUL MARGINAL ENTRY.—A marginal entry made in the bound volume of a legislative journal under instructions of the chief clerk of the House of Representatives, after such journal has been filed with the Secretary of State, though honestly done and with the best motives, is an unlawful interpolation of the journal and without legal effect to give vitality to the enactment of a statute. (Montgomery Beer Bottling Works v. Gaston, 42.)

LIENS.

1. LIENS—CLAIM FOR LABOR OF OTHERS.—A person who has a contract to do certain labor for another may file his laborer's lien therefor, and include therein the labor performed by himself and others hired and paid by him to assist in the work, if such hired labor does not change the contract or relations between the original parties. (Blumauer v. Clock, 966.)

2. LIENS—WAIVER OF.—If a person engaged in getting out logs contracts with his employer that the latter may sell such logs and pay him from the purchase price thereof, he thereby waives his right to the statutory logger's lien. (Anderson v. Tingley, 959.)

See Shipping.

LIMITATION OF ACTIONS.

1. **THE STATUTE OF LIMITATIONS BEGINS TO RUN** against an action from the time the cause thereof accrues. (*Ganser v. Ganser*, 461.)

2. **DEFINITIONS**—“WHEN CAUSE OF ACTION HAS ARISEN” should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action. (*Freundt v. Hahn*, 939.)

3. **LIMITATION OF ACTIONS—NONRESIDENTS**.—A statute providing that “when a cause of action has arisen in another state between nonresidents of this state, and by the laws of the state where the action arose an action cannot be maintained thereon by reason of lapse of time, no action shall be maintained thereon in this state,” does not apply to an action on a note by a resident of the latter state against a nonresident, if, at the time of the execution of the note, both parties were nonresidents and the payee had taken up his residence in the state, prior to the maturity of the note. (*Freundt v. Hahn*, 939.)

4. **LIMITATIONS OF ACTIONS—NOTE WHICH HOLDER HAS OPTION TO DECLARE DUE**.—The holder of a note, who has, upon nonpayment of the interest due, the option of considering the whole amount of principal and interest due, prior to the maturity of the note, does not exercise such option, after default in the payment of interest and before the maturity of the note, by presenting a claim against the estate of the deceased maker for the “amount due” at the date of presentation. (*Moore v. Russell*, 166.)

5. **NEGOTIABLE INSTRUMENTS—WAIVER OF RIGHT TO TREAT AS DUE**.—Though the holder of a note has exercised his option of considering the whole amount due for nonpayment of interest, he may subsequently waive this right, and if he does so, the statute of limitations does not run against him prior to the date originally fixed for the maturity of the note. (*Moore v. Russell*, 166.)

6. **STATUTE OF LIMITATIONS—EXTINGUISHMENT OF RIGHT OF ACTION—SUIT IN ANOTHER STATE**.—Where the statute of limitations of the place where a contract is made operates to extinguish the contract or debt itself, no action can thereafter be maintained upon such contract in the courts of another state, the *lex loci contractus*, and not the *lex fori*, governs. (*Berkley v. Tootle*, 587.)

See **Adverse Possession**; **Executors and Administrators**, 7-10; **Judgments**, 9-13; **Nuisances**, 6.

LIQUIDATED DAMAGES.

See **Damages**, 4, 5.

LIQUOR.

See **Intoxicating Liquor**.

MANDAMUS.

1. **MANDAMUS—INABILITY TO COMPLY WITH**.—The fact that respondent cannot at once comply with a demand made in a writ of mandamus is sufficient to prevent an order requiring immediate compliance therewith. (*State v. Citizens' Tel. Co.*, 870.)

2. TELEPHONE COMPANIES—MANDAMUS.—A telephone company is a quasi common carrier of news, and, as such, bound to supply all alike with similar facilities, under reasonable limitations and without any discrimination, who are in like circumstances. This duty may be compelled by mandamus. (*State v. Citizens' Tel. Co.*, 870.)

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

1. MASTER AND SERVANT—DAMAGES FOR WRONGFUL DISCHARGE.—If an action for the wrongful discharge of a servant is commenced during the term contracted for, but the trial occurs after the expiration of the term, he is entitled to recover the same damages that he would have been entitled to recover had the action been commenced after the expiration of the term. (*Howay v. Going-Northrup Co.*, 942.)

2. MASTER AND SERVANT.—THE DUTY OF A MASTER TO FURNISH A SAFE AND SUITABLE PLACE for his servants to do their work in extends only to such portions of the premises as he has prepared and designed for their occupancy while doing his work, and to such other parts as he knows, or ought to know, they are accustomed to use while doing it. (*Morrison v. Burgess Sulphite Fibre Co.*, 634.)

3. MASTER AND SERVANT—DUTY TO FURNISH SUITABLE TOOLS.—A master is under no duty to furnish his servants with suitable tools, when they put them to uses for which they were not intended, knowing their intended uses. (*Morrison v. Burgess Sulphite Fibre Co.*, 634.)

4. MASTER AND SERVANT.—A MASTER SETS A TRAP FOR HIS SERVANT only when he invites him into a dangerous situation, or creates or suffers one to exist in a place where he knows, or ought to know, his servant is likely to go. (*Morrison v. Burgess Sulphite Fibre Co.*, 634.)

5. MASTER AND SERVANT—SAFE PLACE TO WORK.—A brakeman on a regular freight train, who has nothing to do, directly or indirectly, with ballasting freightyards, may recover for an injury occasioned thereby, if the place where he was injured was not a reasonably safe place to work under the circumstances. (*Hurst v. Kansas City etc. R. R. Co.*, 539.)

6. MASTER AND SERVANT—ASSUMPTION OF RISKS.—An employé who accepts employment with full knowledge of the risks of his situation assumes such risks as are incident to the discharge of his duties, unless they were not so dangerous as to threaten immediate injury, or he might reasonably suppose that he could safely work by the use of care and caution. (*Hurst v. Kansas City etc. R. R. Co.*, 539.)

7. MASTER AND SERVANT—TWO WAYS OF DOING ACT—CONTRIBUTORY NEGLIGENCE.—WHERE A BRAKEMAN, having the choice of two ways to board a car in an unsafe switchyard, one of which is dangerous and the other not, voluntarily chooses the former and is injured, he is guilty of contributory negligence and cannot recover. (*Hurst v. Kansas City etc. R. R. Co.*, 539.)

8. MASTER AND SERVANT.—THE MODE OR SYSTEM IN THE EXECUTION OF WORK lies exclusively within the discretion and will of the master, over which the servant has no control, and the master is not liable to him for personal injuries received, although the master might have adopted a safer method. (*Smith v. Wilmington etc. R. R. Co.*, 740.)

9. MASTER AND SERVANT.—THE TEST OF A MASTER'S LIABILITY is not the danger of the employment, but the neglect of the master in the duty which he owes the servant. (*Smith v. Wilmington etc. R. R. Co.*, 740.)

10. MASTER AND SERVANT—WARNING AGAINST OBVIOUS RISKS.—When the service to be performed is attended with obvious dangers, there is no duty upon the master to warn the servant against it. (*Smith v. Wilmington etc. R. R. Co.*, 740.)

11. MASTER AND SERVANT—ASSUMPTION OF RISKS.—WHEN A SERVANT IS ORDERED TO CHANGE THE METHOD of doing dangerous work to one more dangerous, the danger of both modes being apparent and known to the servant, he assumes all the ordinary hazards naturally incident to the work. (*Smith v. Wilmington etc. R. R. Co.*, 740.)

12. MASTER AND SERVANT—DANGEROUS MACHINERY—INJURY TO EMPLOYEE.—If one charged by statute with the duty of guarding dangerous machinery omits to do so, he is liable to an employé injured thereby, although he could not have reasonably anticipated injury in the precise way it occurred. (*Christianson v. Northwestern Compo-Board Co.*, 440.)

13. MASTER AND SERVANT.—IF CONTRIBUTORY NEGLIGENCE IS AN OPEN QUESTION as to which reasonable men may differ, it is a question of fact, and the finding of the jury thereon cannot be disturbed. (*Christianson v. Northwestern Compo-Board Co.*, 440.)

14. MASTER AND SERVANT.—TO CHARGE AN EMPLOYEE WITH THE ASSUMPTION OF RISKS incident to dangerous machinery, it is not sufficient that he knew its condition, unless he also knew or should have known, the risks to which it exposed him in doing the acts he was doing when injured. (*Christianson v. Northwestern Compo-Board Co.*, 440.)

15. MASTER AND SERVANT—SAFE APPLIANCES.—THE DUTY OF A MASTER to exercise due care to furnish his servant with such appliances for his work as are suitable and may be used with safety extends only to such servants as are required or permitted, or, in the course of their employment, expected, to make use of the instrumentalities provided. (*McGill v. Maine etc. Granite Co.*, 618.)

16. MASTER AND SERVANT—VOLUNTEERS—ASSUMPTION OF RISK.—If a servant voluntarily, and without direction or acquiescence of his master, goes into hazardous work outside his contract of hiring and the line of his employment, he puts himself beyond the protection of the master's undertaking, and himself assumes the risk of any injury received while thus employed. (*McGill v. Maine etc. Granite Co.*, 618.)

17. MASTER AND SERVANT—VOLUNTEERS—ASSUMPTION OF RISKS.—A servant who, without request of his master and of his own motion voluntarily puts himself in a place of danger outside the line of his employment cannot recover for any injury while the master is in the exercise of ordinary care to avoid injuring him. (*McGill v. Maine etc. Granite Co.*, 618.)

18. MASTER AND SERVANT—ASSUMPTION OF RISKS.—Although a servant has some knowledge of attendant danger, his right of recovery is not defeated if, in obeying the order of his master to proceed with the work which results in his injury, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances, and whether he has so acted is a question of fact to be determined by the jury. (*Gundlach v. Schott*, 348.)

19. MASTER AND SERVANT.—SERVANTS ASSUME ALL RISKS IN THE USE OF MACHINERY, except those flowing from the master's negligence in his duty of furnishing safe machinery and keeping it in repair. (*Youngblood v. South Carolina etc. R. R. Co.*, 824.)

20. MASTER AND SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.—If the evidence as to the assumption of risk by an employé is susceptible of more than one inference, the question of negligence and assumption of risk is properly submitted to the jury. (*Youngblood v. South Carolina etc. R. R. Co.*, 824.)

21. MASTER AND SERVANT—ASSUMPTION OF RISK.—UNDER THE SOUTH CAROLINA CONSTITUTION, if an employé is injured while voluntarily operating machinery after knowledge of its unsafe condition, he may nevertheless recover. (*Youngblood v. South Carolina etc. R. R. Co.*, 824.)

See Found Property.

MAXIMS.

See Law.

MINES AND MINING.

MINES AND MINING—MARKING BOUNDARY OF CLAIM—REASONABLE TIME.—Under United States Revised Statutes, sections 2320-2324, providing that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and that "the location must be distinctly marked on the ground so that its boundaries may be readily traced," the locator is entitled to a reasonable time in which to mark the boundaries of his claim after its discovery. What is such reasonable time is a question of law, and must depend upon the circumstances of each case, but generally eight days is not an unreasonable time within which to mark such boundaries after the discovery of the claim. (*Union Min. etc. Co. v. Leitch*, 961.)

See Found Property.

MISREPRESENTATION.

See Fraud.

MONOPOLIES.

1. RESTRAINT OF TRADE—MONOPOLY—VOID CONTRACT. An agreement, the obvious purpose and necessary effect of which is to stifle competition and create a monopoly, is void. (*Tuscaloosa Ice Mfg. Co. v. Williams*, 125.)

2. MONOPOLY—CONTRACT—EFFECT OF IMPORTATIONS. A covenant tending to create a monopoly in a given city is not

relieved by the consideration that its baneful effects may be counteracted in a greater or less degree by importations. (*Tuscaloosa Ice Mfg. Co. v. Williams*, 125.)

3. **MONOPOLY—PUBLIC POLICY—NECESSARIES OF LIFE.** A contract which creates a monopoly in any article of common or even considerable utility or consumption is against public policy, whether it is a necessary of life or not. (*Tuscaloosa Ice Mfg. Co. v. Williams*, 125.)

4. **MONOPOLY—NECESSARIES—ICE.**—At least in populous communities in a warm climate, ice is one of the common necessities of life. (*Tuscaloosa Ice Mfg. Co. v. Williams*, 125.)

See Contracts, 5, 6.

MORTGAGES.

1. **MORTGAGES.—SLIGHT MISTAKES** in the copy of a note embodied in the mortgage given to secure it are not fatal to the validity of the mortgage, when it is apparent that the debt and note sued on are the debt and note referred to in the mortgage. (*Moore v. Russell*, 166.)

2. **A JUDGMENT AGAINST AN ADMINISTRATOR FOR ANY DEFICIENCY**, after a sale of mortgaged premises, must provide that it be paid in the due course of administration. (*Moore v. Russell*, 166.)

3. **MORTGAGEE IN POSSESSION—ACCOUNTING.**—A mortgagee in possession, is in equity accountable for the rents and profits, and is bound to apply them in reduction of the mortgage debt, but, on an accounting, is entitled to be reimbursed for taxes paid, necessary repairs made upon the premises, and interest on the debt up to the time of foreclosure; and if the entire debt is not then paid, the deed made upon foreclosure cannot be set aside by the mortgagor's heirs. (*Baker v. Cunningham*, 490.)

4. **MORTGAGES — FORECLOSURE.—MISTAKE** of three years as to the date of sale in an advertisement of foreclosure sale is immaterial, and no ground for setting the sale aside, if the advertisement correctly describes the parties to the mortgage, where it is recorded and so identifies it that no one can be misled. (*Baker v. Cunningham*, 490.)

5. **MORTGAGES—FORECLOSURE—SETTING ASIDE SALE—LACHES.**—If, after foreclosure and sale of the mortgaged premises and ouster under unlawful detainer against the mortgagors, they set up no claim that the debt has been paid until more than two years thereafter, and after the death of the mortgagor, they are guilty of such gross laches as bars their right to set aside the foreclosure sale and the deed made thereunder. (*Baker v. Cunningham*, 490.)

6. **MORTGAGEE'S SALE UNDER POWER—VALIDITY OF.**—A mortgagee who is vested with the power to sell for breach of condition is a trustee as well as a creditor, and may purchase at his own sale, notwithstanding the general principle of equity which forbids trustees dealing with the trust property in any way looking toward their own private advancement. Such a sale cannot cut off the equity of redemption, and may be avoided by the mortgagor, but it is not void. As to all other persons, it is a valid sale and vests title in the trustee. (*Copsey v. Sacramento Bank*, 238.)

7. MORTGAGE FORECLOSURE—PROCEEDS—ASSIGNEE'S RIGHTS.—A SHERIFF who makes a foreclosure sale under a real estate mortgage, and pays the proceeds to the mortgagee, without notice that one of the mortgage notes has been sold to a third party, is not liable to such party for the amount of the note. (Northern Cattle Co. v. Munro, 444.)

8. IF A MORTGAGEE TRANSFERS ONE OF THE NOTES SECURED BY HIS MORTGAGE, the purchaser acquires an equitable pro rata interest in the security, but no legal title, nor right of foreclosure. (Northern Cattle Co. v. Munro, 444.)

See Chattel Mortgages; Constitutional Law, 14; Deeds, 8; Executors and Administrators, 11.

MUNICIPAL CORPORATIONS.

1. A MUNICIPAL CORPORATION IS NOT UNDER ANY MORAL OBLIGATION to pay the expenses incurred by any of its officers in successfully resisting a proceeding to remove him from office, and hence the legislature cannot impose on it a liability to pay such expenses after they have been incurred. (Matter of Chapman v. New York, 661.)

2. MUNICIPAL CORPORATIONS—CITY OR COUNTY PURPOSE, WHAT IS NOT.—The expenses incurred by a municipal officer in the successful resistance of a proceeding to remove him from office cannot be chargeable against the city on the ground that they were incurred for a city purpose. (Matter of Chapman v. New York, 661.)

3. MUNICIPAL CORPORATIONS—PERFORMANCE OF PUBLIC DUTY—LIABILITY.—The mere fact that a town is engaged in the performance of a public duty, through its agents, does not free it from liability for its negligent acts. (Rhobidas v. Concord, 604.)

4. MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF AGENTS.—Municipal corporations are liable for injury to private rights or persons, resulting from negligence in the performance of a public duty, by their agents or servants, under their direction and control. (Rhobidas v. Concord, 604.)

5. MUNICIPAL CORPORATIONS—LIABILITY FOR INJURY TO SERVANT.—A municipal corporation is liable for an injury to its servant employed on a public work, if such injury is caused by the negligence of its agent under its supervision and control, in failing to furnish such servant with a reasonably safe place in which to work. (Rhobidas v. Concord, 604.)

6. MUNICIPAL CORPORATIONS—AGENTS OF, WHO ARE.—WATER COMMISSIONERS elected by a city council under an ordinance authorized by statute, are agents of the city, and not independent officers whose acts are beyond its direction and control. (Rhobidas v. Concord, 604.)

7. MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF AGENTS.—Water commissioners elected by a city council are the officers of the whole city, and not of any particular precinct, and, so far as they are answerable for their conduct, are answerable to the city and not to the precinct. (Rhobidas v. Concord, 604.)

8. MUNICIPAL CORPORATIONS—SIDEWALKS AND STREETS.—A city has power to designate portions of the streets to be used by horsemen and vehicles, and to reserve other por-

tions for the use of pedestrians exclusively, and to prepare such portions of the streets for such uses respectively. (*Kohlhof v. Chicago*, 335.)

9. MUNICIPAL CORPORATIONS—DUTY AS TO STREETS.—A city is required to maintain only the respective portions of the street, divided into sidewalks and roadway, in a reasonably safe condition for the purposes for which they are respectively devoted. (*Kohlhof v. Chicago*, 335.)

10. MUNICIPAL CORPORATIONS—EXTRAORDINARY USE OF SIDEWALK.—The designation of a portion of the street as a sidewalk does not deprive persons of the right to move goods or articles of personal property from buildings abutting on the street to or from vehicles in the roadway of the street at the edge of the sidewalk, but such use of the sidewalk is not an ordinary use, to accommodate which the city is charged with the duty of constructing and maintaining the sidewalk. (*Kohlhof v. Chicago*, 335.)

11. MUNICIPAL CORPORATIONS—PUBLIC STREETS.—A STEPPING-STONE LOCATED UPON A SIDEWALK in front of a private house is a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desire to visit or enter the house for business or other lawful purposes. (*Robert v. Powell*, 673.)

See Boundaries; Constitutional Law, 20-47.

MURDER.

See Homicide.

NATIONAL BANKS.

See Usury.

NEGLIGENCE.

1. NEGLIGENCE—EXCAVATIONS UNDER SIDEWALK.—A licensee from a city who constructs a vault underneath the sidewalk and a coal-hole thereon need exercise only reasonable and ordinary care and precaution for the public safety. (*West Chicago Masonic Assn. v. Cohn*, 327.)

2. NEGLIGENCE.—WHAT IS CONTRIBUTORY NEGLIGENCE, upon a given state of facts, and whether there is any evidence of it, are questions of law for the court. (*Mitchell v. Raleigh Electric Co.*, 735.)

3. NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTION.—Where the negligence of the defendant appears, and there is no evidence of contributory negligence on the part of the plaintiff's intestate, the court should instruct the jury that the negligence of the defendant was the proximate cause of the intestate's death. (*Mitchell v. Raleigh Electric Co.*, 735.)

See Death; Electrical Companies; Railroads.

NEGOTIABLE INSTRUMENTS.

1. TO CONSTITUTE A NEGOTIABLE PROMISSORY NOTE, THE TIME of payment must be stated with certainty. An instrument payable "within one year after date" fulfills this requirement. (*Leader v. Plante*, 415.)

2. NOTE—INDORSEMENT BEFORE DELIVERY.—One not a party to a note, who signs his name upon the back thereof before its negotiation and before the indorsement of the payee, is, as to the indorsee, an original promisor. (*Merchants' Trust etc. Co. v. Jones*, 412.)

3. A NEGOTIABLE SECURITY, STOLEN FROM THE MAKER before it has become effective by delivery, cannot be enforced by any subsequent innocent holder. (*Salley v. Terrill*, 183.)

4. NEGOTIABLE INSTRUMENTS.—THE MAKER OF AN ACCOMMODATION NOTE is liable thereon, as if the payee had handed the money to such maker and he had given it to the real debtor. The fact that the money was delivered directly to the latter cannot change the maker's liability on the obligation. (*Delaware County etc. Ins. Co. v. Haser*, 763.)

5. NEGOTIABLE INSTRUMENTS — ACCOMMODATION MAKERS—RIGHTS OF, AS INDORSERS OR SURETIES.—When an accommodation maker of a promissory note is, as between him and the payee, a principal debtor, payment is the only way by which he can be discharged. He is not entitled to the rights of an indorser or surety, though the payee knows him to be an accommodation maker. Hence, an extension of time to the real debtor cannot avail such maker as a defense. (*Delaware County etc. Ins. Co. v. Haser*, 763.)

6. NEGOTIABLE INSTRUMENTS — ACCOMMODATION MAKERS FOR THIRD PERSONS.—THE LIABILITY of one who signs a promissory note as maker, though merely for the accommodation of the payee or indorser, is the same whether the accommodation is for the payee or indorser, or for a third person. He cannot, in either case, escape liability by proving that he was but a surety, and that an extension of the time for payment was given to the payee or indorser. (*Delaware County etc. Ins. Co. v. Haser*, 763.)

7. NEGOTIABLE INSTRUMENTS GIVEN AS COLLATERAL SECURITY.—THE LIABILITY OF THE MAKER of a promissory note, given as collateral security for a debt, is not affected by anything less than a discharge or release of the original debtor, and the holder thereof may maintain an action thereon, without first resorting for payment to the original debtor. (*Delaware County etc. Ins. Co. v. Haser*, 763.)

8. BILLS AND NOTES—BONA FIDE HOLDER.—IF A MORTGAGOR, in pursuance of an agreement with the mortgagee, sells mortgaged chattels, and the check received is delivered to the mortgagee in part payment of the mortgage debt, the latter is not a bona fide holder without notice of existing equities. (*National Citizens' Bank v. Ertz*, 438.)

9. NEGOTIABLE INSTRUMENTS—NOTES FOR CONVICT HIRE.—A superintendent of a state prison has no power, express or implied, to take or indorse negotiable notes for convict hire. (*Carolina Nat. Bank v. State*, 865.)

10. PROMISSORY NOTES.—IF THE AMOUNT OF A PROMISSORY NOTE IS CHANGED MATERIALLY, either by a payee or transferee, it is vitiated and destroyed in the hands of the party responsible for the alteration. (*Merritt v. Boyden*, 246.)

11. PROMISSORY NOTES—BONA FIDE HOLDER.—THE EFFECT OF THE ALTERATION of a promissory note by raising the amount thereof is to make it void even as against a subsequent bona fide indorsee without notice. (*Merritt v. Boyden*, 246.)

12. PROMISSORY NOTES—BLANKS—IMPLIED AUTHORITY.—Where a note for ——— hundred dollars is executed to a third party to be negotiated, the maker so far constitutes the former his agent as to be bound to an innocent purchaser of the note by the act of the agent in filling in such blanks. (Merritt v. Boyden, 246.)

13. PROMISSORY NOTES—NEGLIGENCE IN EXECUTING.—A note carelessly executed, leaving room for altering the amount by insertion without defacing the instrument or exciting suspicion of a careful man, binds the maker to any "bona fide" holder without notice, for any amount to which, by reason of the opportunity thus afforded, it is subsequently increased. (Merritt v. Boyden, 246.)

14. PROMISSORY NOTE—BONA FIDE HOLDER.—EVEN GROSS NEGLIGENCE on the part of the purchaser of a note is insufficient to deprive him of the character of a "bona fide" holder. (Merritt v. Boyden, 246.)

15. PROMISSORY NOTES.—MARGINAL FIGURES are not a part of the note, but merely a memorandum of the amount, and their alteration, in the absence of notice of fraud, is immaterial. (Merritt v. Boyden, 246.)

16. NEGOTIABLE INSTRUMENTS—ALTERATION—DISCHARGE OF MAKER.—Any material alteration of a negotiable instrument, such as the addition of another name as maker, by one not a stranger to the paper, whether injurious or not, avoids the contract as to all the parties not consenting. (Brown v. Johnson, 184.)

17. NEGOTIABLE INSTRUMENTS—ALTERATION—MATERIALITY.—Whether an alteration of a negotiable instrument is material or not is to be determined by the court by an inspection of the instrument itself. (Brown v. Johnson, 184.)

See Attachment, 2; Limitation of Actions, 5; Trusts, 2.

NEWSPAPER COMPANY.

See Accounting; Contracts, 3; Damages, 5.

NEW TRIAL.

1. NEW TRIAL—GROUNDS OF.—The party moving for a new trial is restricted to the reasons assigned therefor when motion made. (People v. Petrie, 268.)

2. NOMINAL DAMAGES.—A NEW TRIAL will not be awarded merely to enable the recovery of nominal damages. (People v. Petrie, 268.)

See Appeal, 6.

NOTICE.

See Records.

NUISANCES.

1. NUISANCE—BURDEN OF PROOF.—On the issue as to whether a municipal corporation has created a nuisance by dumping refuse material upon a vacant lot adjacent to plaintiff's premises, the burden of proof is upon plaintiff to prove that such acts were

njurious to health, or wrongfully injured or damaged him or his estate, and that such use of the premises is unreasonable. (Lane v. Concord, 643.)

2. **NUISANCE—EVIDENCE.**—A CITY ORDINANCE prohibiting the acts complained of is competent, but not conclusive, evidence, on the question of whether they create a nuisance. (Lane v. Concord, 643.)

3. **NUISANCE.—USE OF PROPERTY TO CREATE** a nuisance must be such as to produce a tangible and appreciable injury to adjoining property, or such as to render its enjoyment specially uncomfortable or inconvenient. (Lane v. Concord, 643.)

4. **NUISANCE.—UNSIGHTLY APPEARANCE OF A VACANT LOT,** caused by its being used as a dumping ground for refuse material, does not of itself constitute it a nuisance to an adjoining owner nor entitle him to damages. (Lane v. Concord, 643.)

5. **NUISANCE IN A PUBLIC STREET—WHAT IS NOT.**—A stepping-stone or carriage-block eighteen inches high, thirteen inches long, and sixteen inches wide, standing nine or ten inches from the edge of the curb of a sidewalk, in front of a residence, is not a public nuisance, and one injured by stumbling over it cannot maintain an action to recover damages therefor. (Robert v. Powell, 673.)

6. **NUISANCE—STATUTE OF LIMITATIONS.**—If a trespass is followed by injury constituting a continuing nuisance, the damages for the original trespass must all be recovered in one action, but successive actions may be brought to recover damages for the continuation of the wrongful conditions, and in these the damages are estimated only to the date of the bringing of each suit. Hence, the statute of limitations does not begin to run from the date of the original trespass. (Doran v. Seattle, 948.)

OFFICERS.

1. **PRESUMPTIONS—OFFICER DOING DUTY—FACTS NOT PRESUMED.**—While the law will presume that an officer has done a duty which the law casts upon him, it will not presume that a fact exists which the statute requires to exist in order to give the officer power to act, and without which he is prohibited from acting. (Reed v. Lowe, 578.)

2. **CONSTITUTIONAL LAW—POWER TO APPOINT POLICE OFFICERS.**—A statute creating a board of police commissioners for a town, to be appointed by the governor, and authorizing them to appoint, remove, equip, and fix the pay of police officers, is not unconstitutional as taking from the town control of local affairs to which it is entitled, nor as subjecting its inhabitants to unjust and unequal taxation without representation. (Gooch v. Exeter, 637.)

3. **MUNICIPAL CORPORATIONS—POLICE OFFICERS—POWER TO APPOINT.**—The legislature may delegate to towns or town officers authority to select and fix the compensation of police officers for their respective localities, or place upon them the duty of doing so. (Gooch v. Exeter, 637.)

4. **OFFICERS—POWER TO FIX COMPENSATION.**—Power to appoint police officers and set forth their duties includes power to fix the compensation that they are entitled to recover. (Gooch v. Exeter, 637.)

See Constitutional Law, 36-39.

OLEOMARGARINE.

See Constitutional Law, 15; Criminal Law, 2, 2

PARENT AND CHILD.

See Death, 1.

PARTIES.

1. ACTIONS—PARTIES.—Under a statute providing that an action must be in the name of the real party in interest, an action by a trustee is in the name of such party, if he is entitled to the money and can discharge the debtor, although the money when collected is held for the benefit of another. (*Hall v. Henderson*, 53.)

2. ACTIONS—OBJECTION TO PARTIES—WAIVER.—The objection that parties to the action are minors who appear without guardians ad litem cannot be raised after pleading to the merits. (*Blumauer v. Clock*, 966.)

PARTITION.

See Pleading, 4

PARTNERSHIP.

A SALE OR MORTGAGE BY A PARTNER of his interest in the firm assets passes only his share of what may remain after the payment of the partnership debts and the adjustment of the equities of the partners. The share of the purchaser or mortgagee can be determined or recovered only in a suit in equity. (*Leader v. Plante*, 418.)

See Fraud, 3.

PAYMENT.

PAYMENT.—THE TAKING OF A NOTE IS NOT PAYMENT of a precedent indebtedness without an agreement to that effect. (*Delaware County etc. Ins. Co. v. Haser*, 763.)

PENALTY.

See Damages, 4

PENITENTIARY.

See State Prison.

PHYSICIANS.

See Evidence, 5, 6

PLEADING AND PRACTICE.

1. PLEADING.—IT IS NECESSARY TO PLEAD THE COMMON LAW of a sister state, if the pleader relies on it. (*Crandall v. Great Northern Ry. Co.*, 458.)

2. IN PLEADING THE COMMON LAW OF A SISTER STATE it is sufficient to allege as a fact what the law is, without setting out decisions and other evidence thereof. (*Crandall v. Great Northern Ry. Co.*, 458.)

3. PLEADING.—BY REPLYING TO A PLEA after the overruling of a demurrer the right to question the sufficiency of the plea ceases. (People v. Central Union Tel. Co., 838.)

4. ACTION TO SET ASIDE DEED — DISMISSAL.—THE PENDENCY OF A PARTITION SUIT for the same land involved in an action to set aside a sheriff's deed is no ground for a dismissal of the latter suit. (Reed v. Lowe, 578.)

See Appeal, 7; Bill of Particulars; Parties.

PLEDGE.

1. PLEDGE—RIGHT TO ENFORCE.—If personalty pledged as collateral security is taken from the possession of the pledgee without his knowledge or consent, and an adverse claim is set up thereto, the pledgee may, after default made in the payment of the principal debt, maintain a bill in equity to determine the rights of the parties to the property and to enforce the pledge by judicial sale. (American Pig Iron etc. Co. v. German, 21.)

2. PLEDGE.—STATUTES REQUIRING CHATTEL MORTGAGES to be in writing and authorizing their registration, have no application to a pledge. (American Pig Iron etc. Co. v. German, 21.)

3. PLEDGE AND MORTGAGE—DIFFERENCE BETWEEN.—A pledge differs from a mortgage in that the pledgee must have possession and the pledgor retains the legal title to the property, while a mortgage passes the legal title to the mortgagee, and may allow the possession to remain in the mortgagor. (American Pig Iron etc. Co. v. German, 21.)

4. PLEDGE.—NOTICE TO THE PUBLIC OF THE PLEDGEE'S INTEREST in the property is sufficiently given by the possession which must reside in the pledgee, and which, to be effective either for notice or to give validity at law to the pledge, must be complete, unequivocal, and exclusive. (American Pig Iron etc. Co. v. German, 21.)

5. PLEDGE—DELIVERY, WHEN MUST BE MADE.—It is not essential to the validity of a pledge that delivery of the property be made at the time when the contract is executed. The pledge may take effect upon subsequent delivery made in performance of such contract. (American Pig Iron etc. Co. v. German, 21.)

6. PLEDGE—DELIVERY.—If pledged property, in accordance with the agreement of the parties, is placed in a designated place and marked with the pledgee's name, there is a sufficient delivery to sustain the pledge. (American Pig Iron etc. Co. v. German, 21.)

7. PLEDGE — WRONGFUL RETAKING POSSESSION.—A pledgor cannot defeat his pledge by wrongfully retaking possession. (American Pig Iron etc. Co. v. German, 21.)

See Executions, 7.

POLICE OFFICERS.

See Officers, 2-4.

POLICE POWER.

See Constitutional Law.

PRIVILEGED COMMUNICATIONS.

See Evidence, 4-6.

PROCESS.

See Corporations, 18-20; Judgments, 16-18.

PROHIBITION, WRIT OF

See Receivers, 8.

PUBLIC LAND.

See Homesteads.

QUO WARRANTO.

1. QUO WARRANTO.—THE COURSE OF PLEADING is the same in quo warranto as in other forms of action. (People v. Central Union Tel. Co., 338.)

2. IN QUO WARRANTO PROCEEDINGS THE ONUS PROBANDI is on the respondent to prove his title as pleaded, or as much of it as is traversed. (People v. Central Union Tel. Co., 338.)

3. QUO WARRANTO—REPLICATIONS—DEMURRERS.—If in quo warranto proceedings, the respondent sets up its charter as a corporation by way of inducement, and concludes with a denial, under the absque hoc, of the usurpation charged, replications thereto are subject to demurrer if they traverse the allegations of the inducement instead of the denial. (People v. Central Union Tel. Co., 338.)

4. QUO WARRANTO—PARTIES.—If an existing corporation abuses any of its franchises or usurps franchises not belonging to it, the information in quo warranto should be against the corporation as such; but if a body of men unlawfully assumes to be a corporation, the information should be against them as individuals. (People v. Central Union Tel. Co., 338.)

5. QUO WARRANTO—CORPORATIONS.—The effect of filing an information in quo warranto against a corporation by its corporate name, to procure a forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchise, is to admit the existence of the corporation. (People v. Central Union Tel. Co., 338.)

RAILROADS.

1. ESTOPPEL—EJECTMENT—RIGHT OF WAY FOR RAILROAD—COMPENSATION.—If a railroad company, without condemnation proceedings, enters upon land and constructs its roadway thereon without the consent of the owner, but with his knowledge, and he allows the company to expend large sums of money in making such improvements, he is estopped from ousting the company by ejectment, providing it is then willing to make just compensation, but such owner is not estopped from claiming compensation. (Southern Ry. Co. v. Hood, 32.)

2. INJUNCTION AGAINST EJECTMENT—RIGHT OF WAY FOR RAILROAD—COMPENSATION.—If a railroad company, without a conveyance or condemnation proceedings, enters upon land and constructs its roadway thereon without the consent of the owner, but with his knowledge, neither it nor its successor can enjoin an action of ejectment against it by such owner without making, or offering to make, just compensation for the land used for such right of way. (Southern Ry. Co. v. Hood, 32.)

3. RAILWAY ACCIDENT—PROXIMATE CAUSE.—If a railway company places a car without automatic air-brakes in the middle of a train, by reason of which the train becomes divided, and a brakeman in the performance of his duties injured, the disconnection of the air-brake by the insertion of such car is the proximate cause of the injury. (*Crandall v. Great Northern Ry. Co.*, 458.)

4. ONE RAILROAD COMPANY USING THE CARS OF ANOTHER must keep them in repair and free from defects. (*Youngblood v. South Carolina etc. R. R. Co.*, 824.)

5. NEGLIGENCE—EVIDENCE.—In an action to recover for personal injury resulting from the way in which cars are coupled, an allegation as to a warning given to a conductor of his negligence in coupling cars some days before the accident is a proper allegation of negligence, and proof thereof is properly admitted thereunder. (*Stuckey v. Atlantic Coast etc. R. R. Co.*, 842.)

6. NEGLIGENCE—FAILURE TO PROVIDE AUTOMATIC COUPLERS.—A RAILROAD COMPANY is responsible for injuries to its employes, which would not have occurred if its cars had been provided with self-acting couplers. (*Harden v. North Carolina R. R. Co.*, 747.)

7. RAILROAD LEASE—EFFECT ON LIABILITY.—UNDER A CHARTER AUTHORITY "to farm out the right of transportation," a railroad company cannot, by a lease, relieve itself from liability for any acts or negligence or torts committed by its lessee. (*Harden v. North Carolina R. R. Co.*, 747.)

8. NEGLIGENCE, CONTRIBUTORY—CUSTOM OF PERSON INJURED.—Evidence that it was the uniform habit of a person to slacken the speed of his horse and look and listen for the approach of a train before attempting to pass over a certain railway crossing is competent as tending to show that he did so on the trip when he was injured by a passing train, and is also competent to show the exercise of due care on that occasion. (*Smith v. Boston etc. R. R.*, 596.)

9. NEGLIGENCE — RELYING ON PERFORMANCE OF A DUTY.—A person about to drive over a railway crossing with which he is familiar is justified in assuming that the railway company will perform its statutory duty, and warn him of an approaching train by sounding a whistle. Whether he is at liberty to rely upon such warning altogether is a question of fact. (*Smith v. Boston etc. R. R.*, 596.)

10. NEGLIGENCE — RAILROADS — DUTY TO STOP, LOOK, AND LISTEN.—The fact that a person does not entirely stop, look, and listen for the approach of a train before attempting to drive over a crossing with which he is familiar is not conclusive of a want of due care. (*Smith v. Boston etc. R. R.*, 596.)

See Master and Servant, 5-7; Trover, 6-8.

RECEIVERS.

1. RECEIVERS—EFFECT OF APPOINTING.—The appointment of a receiver for a corporation is a suspension of its functions and authority over its property and effects, and is equivalent to an injunction to restrain its agents and officers from intermeddling with its own property in any way. (*Treat v. Pennsylvania etc. Ins. Co.*, 788.)

2. EQUITY—BILL AGAINST INSURANCE COMPANY FOR A RECEIVER—PRAYER FOR INJUNCTION—NECESSITY OF.—When a certificate holder of a mutual life insurance company brings a bill against it for a receiver, the prayer thereof is not defective because it fails to ask for an injunction. (*Treat v. Pennsylvania etc. Ins. Co.*, 788.)

3. EQUITY—BILL AGAINST INSURANCE COMPANY FOR A RECEIVER—COMMISSIONER NOT A NECESSARY PARTY.—When a certificate holder of a mutual life insurance company brings a bill against it for a receiver, he need not join the insurance commissioner as a defendant, where it is not alleged that the company is insolvent, or that its business should be discontinued and its corporate existence cease. (*Treat v. Pennsylvania etc. Ins. Co.*, 788.)

4. EQUITY PLEADING AND PRACTICE—BILL FOR RECEIVER—DEMURRER.—When a certificate holder of a mutual life insurance company brings a bill against it for a receiver, an objection that no injunction is prayed for, and that the insurance commissioner should be made a defendant, ought to be disposed of on demurrer. It is too late, after an answer and trial, to urge that such matters render the bill defective. (*Treat v. Pennsylvania etc. Ins. Co.*, 788.)

5. RECEIVERS—POWER OF TO CARRY ON BUSINESS AND CREATE LIABILITIES.—If a manufactory and the property intended for use therein are in the hands of a receiver, the court has power to direct the discharge of threatened encumbrances, and to have its accumulated raw material manufactured into marketable product, and to this end can authorize the receiver to contract debts and to issue receiver's certificates therefor, and to order them paid out of the product thus manufactured. (*American Pig Iron etc. Co. v. German*, 21.)

6. RECEIVERS—PROTECTION OF PROPERTY—PRORATING EXPENSES.—Expenses incurred by a receiver in protecting the property of the receivership may, in the discretion of the court, be prorated between the parties to the suit according to the value of their respective properties. (*American Pig Iron etc. Co. v. German*, 21.)

7. RECEIVER—JUDGMENT IN FAVOR OF DISCHARGED.—If, pending an action on a note by a receiver, the receivership is terminated, but the action goes on to judgment in the name of the receiver, the judgment is not for that reason void. (*Hall v. Henderson*, 53.)

8. A WRIT OF PROHIBITION TO ARREST PROCEEDINGS UNDER AN ORDER APPOINTING A RECEIVER DOES NOT LIE where the party aggrieved has a plain, speedy and adequate remedy at law. He has such a remedy, though a question of jurisdiction is involved, where the statute permits an appeal from such an order, and provides that the order may be stayed by an undertaking on appeal. (*Jacobs v. Superior Court*, 204.)

RECORDS.

1. PURCHASERS—RECORDS, PROTECTION OF BY.—A purchaser acting in entire good faith is protected by the public record unless there is something to put a reasonable person upon inquiry. (*Lennarts v. Quilty*, 260.)

2. NOTICE.—THE FACT THAT A TRUST DEED IS RELEASED OF RECORD prior to the date on or before which the note secured thereby was payable is not a circumstance to excite inquiry by an intending purchaser, and he acquires title paramount to such released trust deed though such note remained unpaid. (*Lennartz v. Quilty*, 260.)

REFEREES.

1. REFEREES—ADMISSION BY A REFEREE OF INCOMPETENT EVIDENCE cannot reverse a decree supported by competent evidence. (*American Pig Iron etc. Co. v. German*, 21.)

2. REFEREE—SUSTAINING REPORT OF, ON CONFLICTING EVIDENCE.—THE FINDINGS OF A REFEREE will not be set aside if sustained by testimony sufficient to support the verdict of a jury. (*American Pig Iron etc. Co. v. German*, 21.)

RENT.

See Deeds.

REPLEVIN.

See Trover.

1. REPLEVIN—PROPERTY IN CUSTODY OF LAW.—Goods placed in the hands of the plaintiff under a writ of replevin are, as to him, his grantees, and privies, in custodia legis until the determination of the action, and cannot be sold by the party in possession or levied upon by either party or their privies. (*Mohr v. Langan*, 503.)

2. REPLEVIN—CUSTODY OF LAW AS TO THIRD PARTIES.—The pendency of a replevin suit does not place the property in contest in the custody of the law, and does not bar their right to proceed against it by proper judicial process to establish their rights. (*Mohr v. Langan*, 503.)

RESTRAINT OF TRADE.

See Contracts, 5, 6; Monopolies.

REWARDS.

1. REWARD.—SUBSTANTIAL COMPLIANCE WITH ENTIRE TERMS OF OFFER is necessary before claimant becomes entitled to a reward. (*Williams v. West Chicago St. R. R. Co.*, 278.)

2. REWARD.—NO APPORTIONMENT OF AN AWARD can be made for partial service. (*Williams v. West Chicago St. R. R. Co.*, 278.)

3. REWARD BUT PARTLY EARNED.—TO FURNISH INFORMATION that leads to arrest merely does not entitle one to a reward offered "for the arrest and conviction." (*Williams v. West Chicago St. R. R. Co.*, 278.)

4. REWARD.—SERVICES RENDERED IN IGNORANCE of the offer of reward do not entitle the party to the reward. (*Williams v. West Chicago St. R. R. Co.*, 278.)

SAFE DEPOSIT COMPANY.

See Bailment.

SALE.

See Chattel Mortgages.

SHERIFF'S DEED.

See Pleading, 4.

SHIPPING.

1. SHIPPING—CONSTITUTIONAL LAW—STATUTE CONCERNING ACTIONS AGAINST VESSELS.—The statute of California, concerning "actions against steamers, vessels, and boats" does not conflict with section 2, article 3 of the federal constitution, which declares that "the jurisdiction of the federal courts shall extend to all cases of admiralty and maritime jurisdiction," or with section 711 of the United States Revised Statutes, declaring that "the jurisdiction of the federal courts of cases of admiralty and maritime jurisdiction is exclusive, saving to suitors in all cases the rights of a common-law remedy where the common law is competent to give it," and is not invalid though a suit might be brought under it of which the state courts would have no jurisdiction. (Olsen v. Birch, 215.)

2. SHIPPING. — A STATE STATUTE GIVING A LIEN AGAINST STEAMERS, vessels, and boats is valid though no action can be brought under it in the state courts. (Olsen v. Birch, 215.)

3. SHIPPING.—MARITIME CONTRACTS HAVE REFERENCE TO NAVIGATION upon the sea, and in some way to vessels actually being used in commerce or in navigation. (Olsen v. Birch, 215.)

4. SHIPPING—MARITIME CONTRACT—WHAT IS NOT.—A claim for work done in the construction of a steamship, not employed in navigation and which has never been so used, or for services rendered by the crew thereon, does not arise out of a maritime contract. Hence, a state court has jurisdiction to enforce liens under the state law for the work done, where the vessel has not been seized. (Olsen v. Birch, 215.)

5. ADMIRALTY—ACTION IN REM—WHAT IS NOT.—An action to foreclose a lien against a defendant personally, unaccompanied by seizure or constructive service of process, is not the action in rem used in courts of admiralty. (Olsen v. Birch, 215.)

6. SHIPPING—PLEADING—VESSEL ENGAGED IN COMMERCE.—An averment that services sued for were rendered aboard a vessel as members of her crew is not necessarily an allegation that the vessel was engaged in commerce. (Olsen v. Birch, 215.)

SODOMY.

See Indictment.

STARE DECISIS.

See Appeal, 1.

STATE.

MONEY HAD AND RECEIVED.—THE STATE IS NOT LIABLE as for money had and received, for money placed to its credit by a state officer acting without authority. (Carolina Nat. Bank v. State, 865.)

See Estoppel.

STATE PRISON.

STATE PRISONS—CONVICT HIRE—RIGHT TO COLLECT.—A superintendent of a state prison has power to collect the hire due the state for convicts. (Carolina Nat. Bank v. State, 865.)

STATUTE.

See Constitutional Law.

STATUTE OF FRAUDS.

See Contracts, 2; Timber.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STREETS.

See Municipal Corporations.

SUMMONS.

See Process.

SURETYSHIP.

See Executors and Administrators, 2, 12.

SURVIVAL OF ACTIONS.

See Abatement.

TAXATION.

See Constitutional Law, 13, 17.

TELEPHONE COMPANY.

TELEPHONE COMPANIES—UNREASONABLE CONDITION.—A telephone company cannot, as a condition precedent to furnishing an applicant with telephone facilities, require him to stipulate that he will use the system of that company exclusively. (State v. Citizens' Tel. Co., 870.)

See Mandamus.

TIMBER.

1. GROWING TIMBER FORMS PART OF THE REALTY and may be separated from the rest by grant or reservation. When so separated, it retains its character so long as it remains uncut; but when severed, it becomes personal property. (Emerson v. Shores, 404.)

2. GROWING TIMBER.—PAROL OR SIMPLE CONTRACTS for the sale of growing timber, to be cut and removed by the purchaser, are not regarded as within the statute of frauds. (*Emerson v. Shores*, 404.)

3. TIMBER.—A LICENSE TO ENTER AND CUT TIMBER, created by a parol or simple contract, is irrevocable as to that which has been severed in execution of the contract, but as to that not yet severed from the land it is revocable at the will of the owner, or by his death, or by his conveyance without reservation. (*Emerson v. Shores*, 404.)

4. TIMBER, SALE OF.—A CONVEYANCE OF LAND, without reservation of the trees standing on it, but with notice to the grantee that the grantor had sold the standing growth to another, operates as a revocation of the license to cut the timber, and as a breach of the contract for its sale. (*Emerson v. Shores*, 404.)

TRADEMARKS.

1. THE OFFICE OF A TRADEMARK is to point out the origin or ownership of the article to which it is affixed, or, in other words, to give notice of who was the producer. (*Kyle v. Perfection Mattress Co.*, 78.)

2. TRADEMARK.—THE WORDS "PERFECTION MATTRESS" constitute, and will be protected as, a trademark when they have become an established designation with the public of the product of the manufacture of a particular person or corporation. (*Kyle v. Perfection Mattress Co.*, 78.)

3. TRADEMARK, WHEN MAY INDICATE QUALITY.—By the production of a superior article, answering to a fanciful name used as a trademark, such name may acquire a new meaning indicative of quality. This is a natural and desired result, not fatal to the continuance of the use of the name as a trademark. (*Kyle v. Perfection Mattress Co.*, 78.)

4. TRADEMARK.—THAT AN INFRINGEMENT WOULD NOT DECEIVE A CAREFUL OBSERVER does not protect it from an injunction if the label and trademark used were intended to deceive the public and obtain its patronage. (*Kyle v. Perfection Mattress Co.*, 78.)

5. TRADEMARKS AND NAMES.—THE ASSIGNMENT of all the stock, property, and effects of a business carries with it the exclusive right to use a fictitious name in which the business has been carried on, and the trademarks and trade names which have been used therewith. (*Kyle v. Perfection Mattress Co.*, 78.)

6. TRADEMARKS—SIMILARITIES AND DIFFERENCES.—When there is a marked similarity in the labels, signs, literature, and devices for attracting custom, but little weight is attached to precautionary differences or denials of a purpose to deceive the public. (*Kyle v. Perfection Mattress Co.*, 78.)

TRESPASS.

See Injunctions, 2-8.

TRIAL.

1. TRIAL.—SPECIAL INTERROGATORIES ARE PROPERTY REFUSED if they do not pertain to the ultimate fact in issue, or assume an evidentiary fact as proven. (*Gundlach v. Schott*, 348.)

2. JURY TRIAL—PROVINCE OF THE COURT.—IMPLIED KNOWLEDGE AND AUTHORITY are questions of law, and ought not to be left to jury to determine. (*Merritt v. Boyden*, 246.)

See Instructions.

TROVER AND CONVERSION.

1. CONVERSION.—A SALE BY ONE PERSON of the goods of another is a conversion. (*Leader v. Plante*, 418.)

2. CONVERSION.—IF ONE COTENANT OF A CHATTEL SELLS the whole of it as his, his co-owner may maintain trover for his share of the value. (*Leader v. Plante*, 418.)

3. CONVERSION.—IF A WAREHOUSEMAN, without the consent of the owner of grain, ships it to commission merchants to be sold and applied on his indebtedness to them, and it is so sold and applied, they are liable to the holder of the storage receipts as for a conversion. (*Dolliff v. Robbins*, 466.)

4. CONVERSION—MEASURE OF DAMAGES.—If a conversion is accidental, under the belief of a right to the property, and without wrongful intent, the measure of damages is the value of the property when taken; but if the conversion is willful and without color or claim of right, the measure is the value of the property at the time and in the condition when demand is made. (*Dolliff v. Robbins*, 466.)

5. CONVERSION—MEASURE OF DAMAGES.—IF A WAREHOUSEMAN, without the consent of the owner of wheat, ships it to commission merchants, who sell it, the measure of their liability for the conversion is the value of the grain at the time of the demand for its return, less the storage charges and the expense of transportation. (*Dolliff v. Robbins*, 466.)

6. CARRIERS—CONVERSION BY—WHAT IS NOT.—The mere delay in the delivery of goods by a common carrier is not a conversion thereof. A conversion implies a wrongful act, a misdelivery or wrongful disposing or withholding of the property, not a mere nondelivery or refusal to deliver on demand, if the goods have been lost through negligence or been stolen. (*Wamsley v. Atlas Steamship Co.*, 699.)

7. CARRIER—WHEN NOT GUILTY OF CONVERSION.—The fact that a carrier by steamship, on demand, failed to deliver property, expressing its inability to do so, does not make it guilty of a conversion, though the property is subsequently found on the vessel, but not in the place where it was stored, if there is nothing to show the circumstances of its removal from that place, and it may have been stolen by a fellow-passenger or misplaced by one for whose acts the carrier was not responsible. (*Wamsley v. Atlas Steamship Co.*, 699.)

8. PRACTICE—FORM OF ACTION—WHEN MAY NOT BE DISREGARDED.—When the complaint alleges a conversion, and the action is tried on that theory, a judgment in trover must be supported by the evidence necessary at the common law. The court cannot disregard the pleadings and give judgment for the plaintiff on some other theory. (*Wamsley v. Atlas Steamship Co.*, 699.)

9. BAILMENTS—CONVERSION.—A bailee who, having notice of the rights of the real owner, aids and abets the bailor in wrongfully converting the goods is liable for their conversion. (*Mohr v. Langan*, 503.)

10. REPLEVIN—BAILMENT—CONVERSION — CUSTODY OF LAW.—If goods are placed in the hands of the plaintiff under a writ of replevin and by him placed with a warehouseman for safe-keeping, and by the latter, under an order from plaintiff, delivered to an auctioneer, who sells them, and they are afterward adjudged to be the property of the defendant in replevin, both the warehouseman and the auctioneer are liable for a conversion of the goods, regardless of their knowledge as to their ownership. (*Mohr v. Langan*, 503.)

See Attachment, 8.

TRUSTS AND TRUSTEES.

1. TRUSTS.—A BENEFICIARY MAY BE A TRUSTEE without invalidating the trust. Hence, the appointment of a daughter as trustee, in a deed of trust from her father, does not invalidate a trust which secures to her the entire income of the trust property for life. (*Nellis v. Rickard*, 227.)

2. TRUSTS—WHEN SEVERABLE—UPHOLDING OF VALID PART.—An express trust in a deed of trust, securing to the trustor's daughter the entire income of the trust property for life, is severable from a further trust therein giving to her children, or the issue thereof, upon her death, the benefit of the net income of the property, until a certain period, when the fee is to vest in the survivors. Hence, the former trust, being valid, should be upheld, irrespective of the latter's validity. (*Nellis v. Rickard*, 227.)

3. TRUST DEED—WRONGFUL RELEASE.—THE RIGHTS OF THE CESTUI QUE TRUST are superior to those of any person chargeable with notice that the trust deed was released in violation of its terms. (*Lennartz v. Quilty*, 260.)

4. TRUST DEEDS—TRUSTEES' SALE TO THEMSELVES—WHAT IS NOT.—If the debtor of a bank secures it by a trust deed given to trustees known to him to be directors and stockholders of the bank, such trustees are entitled to enforce the trust created by the deed; and if the debt is not satisfied when due, they may sell the property to the bank and give a valid deed thereto. The trustees are not the bank, and the sale is not one by trustees to themselves. (*Copsey v. Sacramento Bank*, 238.)

5. TRUSTEES' SALE—BENEFICIARY AS BIDDER.—When a debtor of a bank secures it by a trust deed given to trustees with knowledge that they are directors and stockholders of the bank, and such trustees enforce the deed, for condition broken, by a sale of the property, the bank is entitled to bid at the sale because it, as such, occupies no fiduciary relation in the transaction. (*Copsey v. Sacramento Bank*, 238.)

6. TRUST DEEDS—TRUSTEES' SALE—SETTING ASIDE.—If a debtor of a bank secures it by a trust deed, which is enforced for condition broken, by a sale of the property to the bank, no action can be maintained to set aside the sale and deed thereunder, on the ground that the trustees were directors and stockholders of the bank, where no injury is shown, and there is no offer to redeem. (*Copsey v. Sacramento Bank*, 238.)

7. TRUSTEES' SALE—DEFICIENCY—ACTION FOR BALANCE.—When a promissory note is secured by a trust deed, and a deficiency exists after a sale for condition broken, the payee may, by an action at law, enforce payment of such deficiency. (*Sacramento Bank v. Copsey*, 242.)

8. TRUSTEES' SALE—WHEN NOT VOID.—If a promissory note given to a bank is secured by a trust deed, which is enforced, after condition broken, by a sale of the property to the bank, the sale is not void because the trustees who conducted the sale were directors and stockholders of the bank, or because the bank was the purchaser. (Sacramento Bank v. Copsey, 242.)

9. OPTION TO RENEW A NOTE WHEN NOT SELF-EXECUTORY.—THOUGH A PROMISSORY NOTE declares that if "not paid at maturity, it is hereby continued from year to year at the option of the holder until paid," it is enforceable by him at any time after maturity when it does not appear that he elected to exercise his option to renew it. Therefore, if secured by a trust deed, the trustees may proceed to sell as provided therein. (Sacramento Bank v. Copsey, 242.)

See Records.

USURY.

1. USURIOUS INTEREST PAID ON A NOTE GIVEN TO A NATIONAL BANK cannot be set off or credited on the principal in a suit by such bank. (Central Nat. Bank v. Haseltine, 531.)

2. USURY—NATIONAL BANKS—REMEDY.—Usurious interest once paid on a note given to a national bank cannot, under the national statute, which is controlling, be set off or allowed as a credit on the principal of the debt. The remedy given by such statute to the person paying such interest to recover double the amount paid by an independent action is exclusive. (Central Nat. Bank v. Haseltine, 531.)

VENDOR AND VENDEE.

1. VENDOR AND PURCHASER—RESCISSION WHERE VENDOR WARRANTS TITLE.—A bill in equity to rescind a contract for the sale of land on the ground of misrepresentations and fraud by the vendor may be maintained, although the vendee may also sue at law upon the covenants of warranty contained in the deed. (Perry v. Boyd, 17.)

2. VENDOR AND PURCHASER—RESCISSION FOR MISREPRESENTATION.—A material fact misrepresented by the vendor and relied and acted upon by the vendee entitles the latter to a rescission of a contract for the sale of land. (Perry v. Boyd, 17.)

3. VENDOR AND PURCHASER.—ON RESCISSION OF A CONTRACT TO PURCHASE LAND THE VENDEE IS ENTITLED to the purchase money, if paid, and if not paid, to an injunction against its collection, without regard to the solvency of the vendor. (Perry v. Boyd, 17.)

4. VENDOR AND PURCHASER—RESCISSION, RIGHT OF, NEED NOT BE DELAYED UNTIL INJURY ACCRUES.—If a purchaser has been induced to enter into a contract for the sale of land by the misrepresentations of the vendor as to any matter affecting the enjoyment of the rights intended to be conferred by the contract, the purchaser need not wait until the enjoyment is actually disturbed or interfered with, before filing his bill for a rescission. (Perry v. Boyd, 17.)

5. VENDOR AND PURCHASER.—DUTY TO MAKE THE TITLE GOOD is upon the vendor, and not upon the purchaser. (Perry v. Boyd, 17.)

6. VENDOR AND PURCHASER—RESCISSON OF CONTRACT—OFFER TO RECONVEY.—A refusal of the vendor, upon demand, to rescind a contract for the conveyance of land, dispenses with the necessity of a formal offer to reconvey. (Perry v. Boyd, 17.)

7. VENDOR AND PURCHASER—RESCISSON OF CONTRACT.—TENDER OF DEED reconveying property held under a contract of sale is not essential to the rescission of the contract on the ground of fraud. (Perry v. Boyd, 17.)

8. VENDOR AND VENDEE—RESCISSON OF CONTRACT.—RESTORATION OF POSSESSION or abandonment of the property is not essentially a prerequisite to the rescission of a contract for its sale. (Perry v. Boyd, 17.)

9. A CONVEYANCE IS SUBJECT TO A CONDITION if it is of two-thirds of a mine, and is in consideration of the agreement of the grantee that he will take exclusive possession, work the mine, and render the grantor one-third of the gross proceeds. The equities of the grantor are the same as if he had leased the mine to be worked for a share of the proceeds. (Downing v. Rademacher, 160.)

10. VENDOR AND VENDEE—PURCHASER WITH NOTICE.—If an interest in a mine is conveyed in consideration of the agreement of the grantee that he will take exclusive possession, work the mine, and render the grantor a share of the proceeds, every subsequent purchaser having notice of such agreement acquires title subject to the condition implied thereby. (Downing v. Rademacher, 160.)

11. EQUITABLE TITLE—RELIEF WHICH MAY BE GRANTED.—In an action to determine conflicting claims to a mine, two-thirds of which has been conveyed in consideration of the agreement of the grantee that he will take exclusive possession, work the mine, and render a share of the proceeds to the grantor, neither the grantee nor his successors in interest with notice are entitled to a decree quieting their title. On the other hand, a decree should be entered against them and in favor of such grantor and his successors in interest declaring that the mine is held subject to such agreement. (Downing v. Rademacher, 160.)

VENUE.

VENUE—SIGNING OF FINDINGS.—The judge who tries a case in the proper county may sign the findings and judgment in a county other than that in which the case is tried. (Matheson v. Ward, 955.)

WAGES.

See Attachment, 4.

WAREHOUSEMEN.

1. WAREHOUSE RECEIPTS.—THE TRANSFER by indorsement and delivery of receipts for wheat stored confers upon the transferee the title to the grain, and every right and remedy of the holder at the time of the transfer. (Dolliff v. Robbins, 468.)

2. WAREHOUSE RECEIPTS.—THE TRANSFER by indorsement and delivery of receipts for wheat stored passes to the transferee the right of action for its conversion prior to the transfer. (Dolliff v. Robbins, 468.)

See Trover, 3-5.

WATERS AND WATERCOURSES.

1. WATER AND WATERCOURSES.—Acquiescence in the diversion of a stream from its natural channel by riparian owners below the point of diversion for thirty years is binding on them, and prevents them from changing the flow of the stream from the new into the old channel. (Matheson v. Ward, 955.)

2. WATERS AND WATERCOURSES—INCREASE AND ACCELERATION.—No one has a right to divert water from its natural course so as to damage another, though he may increase and accelerate it. (Mizell v. McGowan, 705.)

3. WATERS AND WATERCOURSES—DRAINING ONE'S OWN LAND.—A man can dig ditches wherever he pleases upon his own land, provided he runs them into a natural watercourse before leaving it, subject only to the limitation against diversion. (Mizell v. McGowan, 705.)

WILLS.

1. WILLS—SUBSCRIBING WITNESSES.—The statutory requirement that a will must be attested by at least two witnesses, who must subscribe their names in the presence of the testator, is one of the essential requisites to the validity of a will, and must be proved before it can be admitted to probate. (Woodruff v. Hundley, 145.)

2. WILLS—SUBSCRIBING WITNESSES—PRESUMPTION.—Upon proof of the genuineness of the handwriting of the testator, and of the witnesses when dead, it will be presumed that all the requisites of the statute have been complied with, unless the contrary appears upon the face of the will. (Woodruff v. Hundley, 145.)

3. WILLS—ATTESTING CLAUSE, ABSENCE OF.—A will need not recite that the witnesses subscribed their names in the presence of the testator, nor have any attestation clause whatever. From the mere proof of the genuineness of their signatures, it will be presumed that they subscribed their names regularly. (Woodruff v. Hundley, 145.)

4. WILLS—DUE EXECUTION—PRESUMPTION OF FACT.—The presumption of due execution of a will is not one of law, but of fact, which is for the jury to determine. (Woodruff v. Hundley, 145.)

5. WILLS—SEPARATE DETACHED SHEETS.—A will may be written upon separate sheets of paper, and be valid though they remain disconnected. (Woodruff v. Hundley, 145.)

6. WILLS—REVOCATION—ACTS AND INTENT.—To revoke a will there must be a burning, tearing, canceling, or obliterating, with the intention to revoke it, or a new will or codicil, properly executed and attested. (Woodruff v. Hundley, 145.)

7. WILLS—REVOCATION—WHAT NOT A TEARING.—Where a will is written on separate pieces of paper fastened together, the mere removing of the fastenings by the testator is not such a tearing as will constitute a revocation of the will. (Woodruff v. Hundley, 145.)

8. WILLS — REVOCATION.—THE UNEXECUTED INTENTION of a testator to revoke his will is of no consequence. (Woodruff v. Hundley, 145.)

9. WILLS—REVOCATION — EVIDENCE — DECLARATIONS OF TESTATOR.—In the absence of proof of any act of revocation,

declarations of a testator subsequent to the making of his will tending to show a revocation are incompetent as evidence and inadmissible. (Woodruff v. Hundley, 145.)

10. **WILLS—WHO MAY PROBATE.**—In Alabama, only an executor, devisee, or legatee named in a will, or some person interested in the estate, has authority to probate the will. (Woodruff v. Hundley, 145.)

11. **WILLS—CONTEST—JUDGMENT.**—In a will contest, the only judgment authorized to be rendered is one against or sustaining the validity of the instrument. (Woodruff v. Hundley, 145.)

12. **WILLS—CONTEST—OBJECTION OF NO RIGHT TO PROBATE—ABATEMENT.**—In a will contest, the objection that the proponent has no right to prove the will is in the nature of a plea in abatement, which is waived by the contestant pleading to the merits, and such ground of contest may be stricken out. (Woodruff v. Hundley, 145.)

13. **WILLS—CONTEST.—AN INSTRUCTION** which omits all reference to the due execution of the will as a ground of contest is faulty in this respect. (Woodruff v. Hundley, 145.)

14. **WILLS — CONTEST — DUE EXECUTION.**—Instructions are improper if they tend to take from the jury the question of the due execution of the will. (Woodruff v. Hundley, 145.)

15. **WILLS—CONTEST—CONSTRUCTION OF CLAUSES.**—In a will contest, the questions whether certain provisions of the will are void for uncertainty and do not constitute a valid trust are merely involves a construction of those provisions. (Woodruff v. Hundley, 145.)

WITNESSES.

1. **WITNESSES—HUSBAND AND WIFE.**—In a controversy between distributees of an estate, the widow of the intestate is competent to testify to a contract by which her husband adopted one of such distributees as his child. (Lynn v. Hockaday, 480.)

2. **WITNESS—WIDOW AGAINST DECEASED HUSBAND.**—Under a claim of ownership and adverse possession by a widow against an heir of her deceased husband, where both parties have occupied the land for many years after the husband's death, evidence that the widow paid for the land out of her own money is not subject to the objection that it related to a transaction with her deceased husband. (Stiff v. Cobb, 38.)

3. **EVIDENCE.—IF PART OF A CONVERSATION** is disclosed upon cross-examination, the balance may be stated upon redirect examination, so far as it tends to explain or qualify the portion already elicited. (State v. Saidell, 627.)

4. **EVIDENCE — AN INSINUATION ELICITED UPON CROSS-EXAMINATION** regarding the conduct of a justice of the peace at a former hearing may be rebutted by evidence that such hearing was conducted in the usual manner. (State v. Saidell, 627.)

5. **EVIDENCE.—EXPERT TESTIMONY** is not admissible unless the jurors themselves are not capable of drawing correct conclusions from the facts proven. (Hurst v. Kansas City etc. R. R. Co., 539.)

6. **NEGLIGENCE—EXPERT TESTIMONY.**—Error in admitting expert evidence to show what is a proper and safe condition of a railroad switchyard is not prejudicial to a defendant, guilty

of negligence in maintaining its yards in an unsafe condition. (Hurst v. Kansas City etc. R. R. Co., 539.)

7. EVIDENCE—EXPERTS.—Whether the operation of machinery by a twisted belt is dangerous is not a matter of common knowledge, and expert testimony is admissible on that subject. (Gundlach v. Schott, 348.)

See Evidence; Wills, 1, 2.

WRONGFUL DEATH.

See Death.

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